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In the

Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

James Dean Walker ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER
IN SUPPORT OF PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT OF APPEALS' NEWLY ANNOUNCED STANDARD FOR VIEWING NEWLY DISCOVERED EVIDENCE IN FEDERAL HABEAS CORPUS PROCEEDINGS OF WHETHER THE EVIDENCE IS "CREDIBLE ENOUGH TO DESERVE THE ATTENTION OF A JURY" IS WARRANTED UNDER THE FOURTEENTH AMENDMENT?

II.

WHETHER THE FINDINGS OF FACT MADE BY THE DISTRICT COURT BELOW WERE CLEARLY ERRONEOUS AS THAT TERM IS USED IN FEDERAL RULE OF CIVIL PROCEDURE 52(a), SUCH THAT THE COURT OF APPEALS COULD PROPERLY DISREGARD THEM AND MAKE NEW FINDINGS ON APPEAL?

III.

WHETHER A FINDING OF A STATE COURT WAS UNDULY DEPRIVED OF ITS PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. §2254(d)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISION INVOLVED 2

COURT RULE INVOLVED 2

STATUTORY PROVISION INVOLVED 3

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 18

APPENDIX A-1

TABLE OF AUTHORITIES

CASES: Page

Anderson v. City of Bessemer, ___ U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (No. 83-1623; 19 March, 1985) 11, 12, 14, 16

Frito Lay, Inc. v. So Good Potato Chip Co., 549 F.2d 927 (8th Cir. 1976) 11

Inwood Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 10

Jackson v. Virginia, 443 U.S. 307 (1979) 12

Larrison v. United States, 24 F.2d 82 (7th Cir. 1928) 9

Sanders v. United States, 373 U.S. 1 (1963) 7

Smithey v. State, 269 Ark. 538, 602 S.W.2d 676 (1980) 15

State v. Caldwell, 322 N.W.2d 574 (Minn. 1982) 9

State v. Teves, 679 P.2d 136 (Hawaii 1984) 9

Sumner v. Mata, 449 U.S. 539 (1981) 10

Swanson v. Baker Industries, Inc., 615 F.2d 479 (8th Cir. 1980) 11

United States v. Agurs, 427 U.S. 97 (1976) 13

United States v. Frady, 456 U.S. 152 (1982), reh. denied, 456 U.S. 1001 (1982) 9

United States v. Krasny, 607 F.2d 840, 59 A.L.R. Fed. 645, (9th Cir. 1979) *cert. denied*, 445 U.S. 942 (1980) 9

United States v. Stofsky, 527 F.2d 237 (2nd Cir.) 1975 *cert. denied*, 429 U.S. 819 (1975) 9

Walker v. Bishop, 408 F.2d 1378 (8th Cir. 1979) 5

Walker v. Bishop, 295 F.Supp. 767, (E.D. Ark. 1967) 5, 7, 11

Walker v. Lockhart, 763 F.2d 742 (8th Cir. 1985) 8

Walker v. Lockhart, 726 F.2d 1238 (8th Cir. 1984) ... 6, 7, 12

Walker v. Lockhart, 598 F.Supp. 1410 (E.D. Ark. 1984) 8

Walker v. State, 241 Ark. 300, 408 S.W.2d 905 (1966), *cert. denied*, 386 U.S. 682 (1967), *reh. denied*, 387 U.S. 926 (1967) 5

Williamson v. State, 267 Ark. 46, 590 S.W.2d 847 (1979) 15

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 10

STATUTES:

28 U.S.C. §2254(d) 3, 8

RULES:

Unif. R. Evid. 901(a) and (b) (8), Ark. Stat. Ann., Vol. 3A (Repl. 1977), p. 648 14

ANNOTATIONS

Annot., 59 A.L.R. Fed. 657 (1982) 9

INDEX TO APPENDIX

Page

Opinion of the Court of Appeals for the Eighth Circuit granting habeas relief; delivered 17 May 1985 ..... A-1

Opinion of the Arkansas Supreme Court affirming Walker's conviction; delivered 31 October 1966 ..... A-39

No. ____

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR PETITIONER IN SUPPORT OF PETITION

The Petitioner respectfully prays the Court to issue forth a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit set out herein, *infra*.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears as *Walker v. Lockhart*, at 763 F.3d 942 (1985) and is reproduced in the Appendix, *infra*. No petition for rehearing was filed.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was delivered on 17 May 1985. No petition for rehearing was filed.

The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT, §1

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COURT RULES INVOLVED

Rule 52(a), Federal Rules of Civil Procedure

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a matter, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law

appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

and Roy Johns, Architect. (R. 155, 203)

Judgment that Advance may recover in any pending action arising out of the same construction

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more the circumstances respectively set forth in paragraphs numbered (1) and (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

This case was spawned by the early morning murder of a North Little Rock, Arkansas policeman on 16 April 1963. The Respondent and Russell Freeman Kumpe, in the company of Linda Ford, were in flight from an incident in a Little Rock night club, when stopped on a long stretch of highway by Officer Gene Barentine of the North Little Rock, Police Department. Barentine parked directly behind the Respondent's vehicle. While Barentine was frisking Kumpe, who was spread eagle on the front left fender of his vehicle, Officer Jerrell Vaughan, the deceased, arrived and proceeded to the front passenger door of the Respondent's vehicle, where the Respondent sat. Vaughan never made it to the door, but died as a result of a single gunshot to the heart. The fatal bullet was determined to have been fired from a handgun the Respondent was found lying atop or beside.

The Respondent was afforded two trials, a three day federal habeas corpus hearing and an appeal to the Eighth Circuit Court of Appeals before escaping from custody after serving some twelve years of a life sentence for first degree murder. *See Walker v. State*, 239 Ark. 172, 388 S.W.2d 13 (1965); *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), *cert. denied*, 386 U.S. 682 (1967), *reh. denied* 387 U.S. 926 (1967); *Walker v. Bishop*, 295 F.Supp. 767 (E.D. Ark. 1967); *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969).

Beginning with the second appeal, the Respondent raised the issue of judicial bias on the part of the state trial judge, and the Arkansas Supreme Court, the federal district court and a unanimous panel of the Eighth Circuit Court of Appeals all ruled adversely to him on this issue.

After the Respondent's recapture following arrest for selling illicit drugs, the Respondent attempted to raise the judicial bias issue in federal habeas again, but the reconsideration of it was denied without published opinion and

that denial was affirmed by the court of appeals sitting *en banc*. *See Walker v. Lockhart*, 726 F.2d 1238 (8th Cir. 1984). The Court of Appeals then granted a motion for recall of mandate and remanded the case to the district court for consideration of newly discovered evidence indicating Kumpe had committed the murder. This evidence consisted primarily of an entry of a diary of sorts and later, as the result of a discovery by the State, a document purporting to be a carbon copy of a surreptitiously recorded conversation between Kumpe and his sister, Mildred Eisner, in 1963, at the prison in which Kumpe was then incarcerated. The district court was ordered to hear this evidence and determine, among other things, whether any of it would be admissible in a state trial court, whether it was "credible enough to deserve the attention of a third jury," and whether the ends of justice standard was tipped in favor of a new trial after the evidence was heard. The district court held a hearing, determined that the transcript was inadmissible, the diary entry admissible only as impeachment evidence if Kumpe testified, but not as substantive evidence, and that the ends of justice would not be served by a retrial, the evidence introduced at the hearing confirming rather than casting doubt on the Respondent's guilt.

From this ruling the court of appeals found the trial judge bias issue, which was not considered in this instance or briefed by the parties, justified a third trial and that the transcript, held inadmissible and immaterial by the district court, created a reasonable doubt as to the Respondent's guilt.

The Petitioner seeks review of this decision.

REASONS FOR GRANTING THE WRIT

I.

THE NEW STANDARD FOR NEWLY DISCOVERED EVIDENCE.

The court of appeals held that the Respondent is entitled to habeas corpus relief because he was deprived of due process of law by a biased trial judge. This opinion follows rulings to the contrary by the Arkansas Supreme Court. *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), *cert. denied*, 386 U.S. 682 (1967), *reh. denied*, 387 U.S. 926 (1967), and the Federal District Court for the Eastern District of Arkansas in 1967 following a three day habeas corpus hearing, *Walker v. Bishop*, 295 F.Supp. 767 (E.D. Ark. 1967), which was affirmed by a unanimous three judge panel of the court of appeals, *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969). The same federal district court in 1981 following a one day hearing (no published opinion) refused to reconsider that ground in a second habeas petition, holding that the ends of justice, as that phrase is used in *Sanders v. United States*, 373 U.S. 1 (1963) would not be served by a reconsideration of the claim. The court of appeals, sitting *en banc*, affirmed that decision. See *Walker v. Lockhart*, 726 F.2d 1238 (8th Cir. 1984).

When the Federal District Court for the Eastern District of Arkansas again heard evidence on this case in 1984 pursuant to the court of appeals' order upon recall of mandate, it did not consider the state trial judge's bias, for that issue was not ordered reconsidered. The district court was ordered to hold a hearing on the matter alleged to be newly discovered evidence and determine whether any of it was "credible enough to deserve the attention of a jury," whether any of it would be admissible in a state trial court and whether, " . . . the new evidence, when considered against the background of the existing record, sufficiently tips the balance of the ends of justice standard to require

that a new trial be held." In accordance with that order the district court found after a four day hearing no credible evidence that Russell Kumpe shot the victim or shot at him on the night of the murder and, as to whether the balance of the ends of justice standard compelled a new trial, the court answered "strongly in the negative," holding that the new evidence confirmed, rather than raised doubts about the Respondent's guilt. *Walker v. Lockhart*, 598 F.Supp. 1410, 1430, 1434, (E.D. Ark. 1984).

From this decision replete with factual findings adverse to the Respondent and no ruling concerning the trial judge's bias, the court of appeals now rules that the trial judge's bias deprived the Respondent of a fair trial. In so doing the court of appeals ignores a prior ruling on the issue by the Arkansas Supreme Court, thus violating the presumption of correctness of state court findings contained in 28 U.S.C. §2254(d), and a federal district court holding to the contrary, thus violating the Clearly Erroneous Rule regarding federal district court fact findings set out in Federal Rule of Civil Procedure 52(a).

The court of appeals justifies its disregard of the other courts' findings on this issue on the basis of a new, never before announced standard by which to judge newly discovered evidence, to wit, whether it is credible enough to deserve the attention of a jury. Because "a jury *could* reasonably" make an inference favorable to the Respondent from most of the evidence adduced, 763 F.2d at 950, because a witness's testimony *could* be believed by a jury, although discounted by the district court, 763 F.2d at 954, because Walker's explanation of his confessions *might* be accepted by a jury and because another witness's account of another confession *might* not be believed, *id.*, this new standard is deemed satisfied. As explained later in the opinion, the standard is equivalent to a "possibility" standard of evidence used in some jurisdictions in a motion for new trial on the basis of newly discovered evidence, also called a *Larrison* standard after the case considered to have given it

birth, *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). Under this standard, newly discovered evidence that *might*, as opposed to probably would, change the result of a trial can mandate a new trial. It is reserved, however, for cases of perjury, *State v. Teves*, 679 P.2d 136 (Hawaii 1984); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982); and Annot., 59 A.L.R. Fed. 657 (1982), but is not without its detractors even in cases of perjury. In this regard see *United States v. Krasny*, 607 F.2d 840, 59 A.L.R. Fed. 645 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Stofsky*, 527 F.2d 239 (2ndd Cir. 1975), *cert. denied*, 429 U.S. 819 (1975).

Whatever merit that standard might have in cases of motions for new trial, it has no merit in habeas corpus law. As the Court stated in *Milton v. Wainwright*, 407 U.S. 371, 377 (1972), "The writ of habeas corpus has limited scope; the federal courts do not sit to retry cases de novo but, rather, to review for violation of federal constitutional standards." It is not simply another appellate forum, and grounds requiring a reversal on appeal will often not be enough to mandate habeas relief. *United States v. Frady*, 456 U.S. 152 (1982), *reh. denied*, 456 U.S. 1001 (1982). The standard announced below does not keep the scope of habeas corpus limited, but opens the gates wider for an even larger deluge of habeas petitions on federal district court dockets already inundated with such petitions. [1]

Aside from the newly announced standard's total lack of antecedent in any authority known to the Petitioner or the dissent in the court below, the standard is also illogical. It simply does not follow that because some new evidence *could* be believed by a jury and, thus, *could* result in a dif-

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The volume of federal habeas corpus petitions filed in the federal district courts has swelled from 541 in 1953, *Brown v. Allen*, 344 U.S. 443, 536 n. 8 (1953) (concurring opinion, Jackson, J.), to 8,349 in 1984. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1984, Table 24, p. 143.

ferent outcome, that the verdict, therefore, was or probably was a product of trial judge bias and not of the evidence presented. The evidence presented last in the district court has to do with the Respondent's guilt, not the trial judge. Because it had nothing to do with the trial judge, it really cannot be used as a reason, or at least a good enough reason, to deprive the Arkansas Supreme Court's finding of no deprivation of due process on account of trial judge bias of its presumption of correctness under §2254(d). See *Sumner v. Mata*, 449 U.S. 539 (1981).

For the same reason it cannot be used to disregard the district court's findings in this regard as clearly erroneous, as a federal appellate court must find a district court factual finding to be in order to overturn it on appeal under Rule 52(a). Federal Courts of Appeal do not sit, " . . . to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). As stated in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 858, 859 (1982):

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 339 U.S. 475, 594, 94 L.Ed. 1007, 70 S.Ct. 711 (1950).

Giving the facts found in the district court in 1967 concerning judicial bias a different, more sinister cast not given them by the district court is just what the court of appeals did herein, and there is absolutely no reason given for the rejection of those findings other than that the court of appeals simply interpreted the evidence differently, i.e., in the light most favorable to the Respondent.

Most of the district court's specific findings of fact in 1984 were not flatly rejected as erroneous; rather, they

were deemed not made by the proper "credible enough to deserve the attention of a jury" standard after which observation they were rejected and redecided favorably to the Respondent. The most egregious and flagrant violations of Rule 52(a) concerned the findings as to the state of the record existing at the time of the hearing in 1984, which was to have served as the backdrop against which the new evidence was to have been measured by the district court. The district court found the new evidence to confirm the Respondent's guilt when viewed against the background of the existing record. 598 F.Supp. at 1434. The court of appeals felt itself not bound by the district court's view of the existing record because the existing record was not all made before the district court, i.e., is written. *See* 763 F.2d at 954, 955 n. 24. The court then proceeds to employ a rule expressly disapproved by this Court recently in *Anderson v. City of Bessemer*, ____ U.S. ____, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528, 529 (No. 83-1623 19 March 1985), which frees district court findings made on the basis of documentary evidence from the strictures of Rule 52(a) and permits an appellate court to make its own findings regarding such evidence. *See Swanson v. Baker Industries, Inc.*, 615 F.2d 479, 483 (8th Cir. 1980); *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927 (8th Cir. 1976). The court of appeals found, apparently in reliance on that rule, such things as a changed theory of the case presented by the state at the second trial. The opinion's statement of the facts states that the state contended at the first trial that Barentine shot Walker, but changed its theory in the second trial to contend that the victim had shot Walker. 763 F.2d 945, 946. This very issue was decided in the opposite manner by the district court in the 1967 habeas action. *See Walker v. Bishop, supra*, 295 F. Supp. at 777.

Although this finding is not really crucial or important, it is illustrative of the court of appeal's view of the adequacy of the evidence presented in the many proceedings had before the 1984 habeas hearing, a view at odds with the

view of every other court that has considered the question, including the court of appeals itself. *See Walker v. Lockhart, supra*, 726 F.2d at 1245, 1246. As the court of appeals held later in the opinion, in ruling on the suppression issue, to be discussed, *infra*, " . . . the evidence used to convict Walker was close." 763 F.2d 959.

This finding of fact, made well after proceedings to determine that question and after several findings to the contrary, was an inefficient use of judicial resources and basically unfair. As stated by the Court in *Anderson v. City of Bessemer, supra*, 105 S.Ct. at 1512, 84 L.Ed.2d at 529:

> . . . the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade . . . more judges at the appellate level is requiring too much.

It is clear from the foregoing that the decision is really based not on trial judge bias, but on newly discovered evidence. The court notes at 763 F.2d 960 that the Kumpe-Eisner transcript, to be discussed, *infra*, creates a reasonable doubt as to Walker's guilt. As the dissent states at 763 F.2d 967, "The court's exercise in reviewing the newly discovered evidence issue is merely a springboard to justify reconsideration of the judicial bias claim." The use of the judicial bias claim to grant relief could also be called a subterfuge to grant relief on the basis of insufficient evidence without having to meet the test of *Jackson v. Virginia*, 443 U.S. 307 (1979), which had already been determined adversely to the Respondent by the court of appeals in the last appeal, and rejecting the prior finding to the contrary. 726 F.2d 1245, 1246. As noted by the court of appeals in its last opinion, *Jackson v. Virginia* holds that one is not deprived of due process of law by the evidence presented to convict unless no rational trier of fact could convict on the facts in question. This standard is a far cry from the "credible enough to deserve the attention of a jury" standard an-

nounced in this opinion. Indeed, that standard is the antithesis of the standard announced in *Jackson*, for *any* evidence can be credible enough to present to a jury.

II.

THE KUMPE-EISNER TRANSCRIPT

The Kumpe-Eisner transcript was an eleven legal size page, single-spaced typed document purporting to be a carbon copy of a transcript of a surreptitiously recorded conversation of Russell Kumpe and his now deceased sister, Mildred Eisner, in 1963 at an Arkansas prison in which Kumpe was then incarcerated. The salient portions of it were a statement attributed to Kumpe that he "did shoot at that policeman and he will go crazy trying to figure out what happened to the gun, and a later statement indicating that the Respondent committed the murder.

The district court heard testimony concerning this document from Kumpe and Paul McDonald, the person in whose possession it was found. Its findings were (1) that the document would be inadmissible in an Arkansas state court because it was not authenticated by any witness, Kumpe specifically, 598 F.Supp. 1421, 1430, and (2) that assuming, *arguendo*, suppression, no due process violation occurred because the document was not material, as that term is used in *United States v. Agurs*, 427 U.S. 97, 112 (1976). 598 F.Supp. 1433.

The court of appeals rejected both of those findings out of hand, thus violating again Rule 52(a) and substituting its own view of the facts for that of the district court. It held that Kumpe's testimony authenticated the document. After restating some of Kumpe's testimony which was presented before the district court in 1984, the court of appeals simply concludes that the district court's finding on this matter was clearly erroneous. The Petitioner notes in this regard Kumpe's answer to the district court's question on redirect

examination of whether he remembered making the statements set out in the transcript as, "No, sir, I could not say that." (T. 127) It is apparent when the testimony is so viewed that both the district court's view of Kumpe's testimony on the issue and the court of appeal's view are plausible. It is the district court's view, however, that must prevail, for, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. [citations omitted.]" *Anderson v. City of Bessemer, supra*, ____ U.S. ____, 105 S.Ct. at 1512-13, 84 L.Ed.2d at 528.

The same is true of the district court's factual findings regarding the requisites for authentication under Unif.R.Evid. 901(b)(8), Ark. Stat. Ann., Vol. 3A (Repl. 1979), p. 656. Under that rule a document is authenticated if (1) it is in such condition as to cause no suspicion concerning its authenticity, (2) it was in a place as such a document would likely be and (3) it has been in existence for twenty years or more. The district court found that the evidence showed that the transcript had been in existence for twenty years or more, but that there was no evidence concerning where such a document would likely be. The transcript was also not found to be in such condition as to create no suspicion as to its authenticity, the manner of its discovery being found to have raised a great deal of suspicion as to its authenticity. 598 F.Supp. 1431.

With a modicum of discussion of the testimony, the court of appeals found that the nature of the document and its location, McDonald's custody, made the document authenticated under Rule 901 (b) (8) and admissible as substantive evidence under Unif.R.Evid. 803 (16), Ark. Stat. Ann., Vol. 3A (Repl. 1977), p. 648. In light of McDonald's testimony on cross-examination that this transcript was the only one of its kind that he ever received and that he did not know that it was a standard practice to surreptitiously record conversations at the prisons at that time, (T. 511, 512), the court of appeals' finding that McDonald's posses-

sion was a place where such a document would likely be is incredible, indeed. In holding that the condition of the document was such as to create no suspicion as to its authenticity, the court of appeals relied on nothing but its "nature" and did not consider its sudden appearance in McDonald's catchall file as did the district court, 763 F.2d 956.

The Petitioner is aware that the court of appeals based its finding in this regard on Rule 901(a) and not on any particular subsection of that rule. Because it rejects generally the district court's ruling on the same evidence, however, it necessarily rejects specifically each part of that ruling. Most of the ruling is concerned with the testimony of Paul McDonald. As has been noted, because these rulings concern McDonald's testimony and because both views of his testimony on these points is plausible, the district court's view should prevail. *Anderson v. City of Bessemer, supra.*

The court of appeals also disregards in holding the transcript to be authenticated and admissible under Arkansas law the rule that the transcript must not only be what it purports to be, but also be an *accurate* reproduction of the conversation it purports to portray. *See Smithey v. State,* 269 Ark. 538, 602 S.W.2d 676 (1980); *Williamson v. State,* 267 Ark. 46, 590 S.W.2d 847 (1979).

In holding that the transcript created a reasonable doubt as to the Respondent's guilt and was therefore material as that term is used in *United States v. Agurs, supra,* the court of appeals again substituted its view of the existing, written record for that of the district court, as well as its view of the evidence adduced in the district court in 1984 for that of the district court. In the first part of the district court opinion, 598 F.Supp. 1411-1417, the existing record before the 1984 hearing is briefly recounted from the first appeal through to the last opinion of the court of appeals. Stressed in this portion of the opinion is the overwhelming consensus of all the courts considering the question up until now that the evidence to convict the Respon-

dent was more than adequate. The court of appeals characterization of this evidence as "close" at 763 F.2d 959, accompanied by absolutely no discussion, is manifestly a rejection of the district court's finding in this regard for no good reason other than that the majority of the court of appeals views the record differently. As noted, *supra*, the court of appeals is not free to discard district court findings and make its own findings of fact of written evidence simply because it is written and not oral. *See Anderson v. City of Bessemer, supra*, ____ U.S. ____, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528, 529 (March 19, 1985), expressly disapproving this practice engaged in by some courts, including the court of appeals.

The district court found that some of the new evidence, most notably the diary entry, would be admissible, but only as impeachment evidence. 598 F.Supp. 1430. As discussed, *supra*, the Kumpe-Eisner transcript was held inadmissible, and the district court found no credible evidence in the mass of new evidence presented that Kumpe shot the deceased or shot at him. 598 F.Supp. 1430. The court of appeals however, finds that the evidence presented in the district court in 1984 contained substantive evidence that Kumpe fired a gun at someone. From this finding the court of appeals makes the fantastic leap of logic to the conclusion that the murder weapon was therefore out of the Respondent's hand at the time of the murder. 763 F.2d 957, 959.

Because this finding involves the testimony of Kumpe and Paul McDonald (as discussed above), the court of appeals denied the district court finding deference again for no good reason. The district court credited Kumpe's denial of the statements attributed to him in the transcript and his denial of shooting at all on the night in question, and credited this live testimony. 598 F.Supp. 1427, 1428. The court of appeals credited the transcript, however, and not Kumpe's live testimony and made a ruling one hundred and eighty degrees from the district court's ruling. Because two views of any evidence, but especially live

testimony, are always present, the district court's view could not have been clearly erroneous. *See Anderson v. City of Bessemer, supra.* Thus, Rule 52(a) is again violated.

Also significant in this regard is the fact that the court of appeals holds evidence material in the *Agurs* sense of the word that goes only to impeachment of a witness who never testified at any of the trials in this case. As noted by the dissent below, this Court has never ruled that such evidence would be sufficient to warrant the protection of such cases as *Agurs.* 763 F.2d 966.

CONCLUSION

For the aforementioned reasons and authorities, the Petitioner respectfully prays the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the errors discussed in this petition.

IN THE ALTERNATIVE the Petitioner prays the Court to hold this case pending the resolution of *Henderson v. Wilson*, 53 U.S.L.W. 3811 (U.S. 24 June 1985) (No. 84-1479), in which certiorari was granted on 24 June 1985. That case also involves a circuit court of appeals' ruling on a successive habeas corpus petition in which the fact finding of a state court, two federal district courts and the majority of a panel of the court of appeals were disregarded. The finding disregarded was that a habeas petitioner had not been interrogated by a government informant placed in a jail cell with him. As in this case, the court of appeals in *Henderson* held to the contrary, i.e., that the habeas petitioner had been interrogated, after four previous findings of no interrogation.

Respectfully submitted,

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APPENDIX

James Dean WALKER, Appellant,

v.

A. L. LOCKHART, Superintendent of the Arkansas Department of Corrections, Appellee.

No. 81-1700 (Habeas).

United States Court of Appeals, Eighth Circuit.

Submitted, Jan. 17, 1985.

Decided May 17, 1985.

Bill Bristow, Jonesboro, Ark., for appellant.

Theodore Holder, Asst. Atty. Gen., Little Rock, Ark., for appellee.

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, En Banc.

BRIGHT, Circuit Judge.

In January 1984, this court, in a five to four decision, affirmed the district court's [1] denial of James Dean Walker's second petition for a writ of habeas corpus. *Walker v. Lockhart*, 726 F.2d 1238 (8th Cir.) (en banc), *petition for cert. dismissed by stipulation*, ____ U.S. ____, 105 S.Ct. 17, 82 L.Ed.2d 912 (1984). Thereafter, new evidence surfaced relating to the crime for which Walker had been convicted. We recalled our mandate on June 13, 1984, and remanded the case to the district court with instructions to hold a

hearing on the new evidence and to certify its findings to this court. *Id.* at 1265. Upon careful review of the new evidence and the district court's findings, we conclude that the ends of justice will be served by now directing the district court to grant the writ unless the State of Arkansas commences proceedings to retry Walker within sixty days from issuance of the mandate of this court.

I. BACKGROUND.

The factual background and lengthy procedural history of this case are set forth in some detail by both the majority and the dissent in this court's recent en banc opinion. Briefly, on April 16, 1963, James Dean Walker and a companion, Russell Kumpe, were at a Little Rock nightclub with two women, Linda Ford and Mary Louise Roberts. Following an altercation in which another patron was shot, Walker, Kumpe, and Ford left the Little Rock area in Kumpe's Oldsmobile. Roberts, who was concerned about Ford, followed in a cab driven by Aaron Paul Alderman. Police Officer Gene Barentine pursued and stopped the Oldsmobile and parked his vehicle behind it. Officer Jerrell Vaughan arrived on the scene almost immediately thereafter, as did cabdriver Alderman and another cabdriver, Thomas Short.

Barentine ordered Kumpe out of the driver's side of the car and began to search him. Vaughan approached the Oldsmobile on the passenger's side of the car. At this point, the precise order of events becomes uncertain, but following an exchange of gunfire, Officer Vaughan lay dead or near death with a single bullet wound to his heart. Walker, who sustained five gunshot wounds, lay face down beside the Oldsmobile a few feet from Vaughan. In his right hand, Walker held a fully-loaded, undischarged gun. Kumpe, who tried to escape at some point during the confusion, had been shot twice by Barentine.

It is undisputed that the gun found in Walker's hand was not the murder weapon. Police found a second gun, a

fully loaded Colt .38, under the front seat of the Oldsmobile. A third gun, found either underneath or near Walker's body, was later identified as the murder weapon.

The State charged Walker with first degree murder. At trial, the prosecution proceeded on the theory that Walker shot Vaughan with the gun that was found near his body, and that Barentine then shot Walker. Linda Ford and cabdriver Thomas Short offered evidence indicating that Walker shot at Vaughan. Ballistics evidence indicated that the bullet which killed Vaughan was fired from the gun found on the ground near Walker. The jury convicted Walker of first degree murder and sentenced him to death. The Arkansas Supreme Court reversed his conviction and remanded the case for a new trial. *Walker v. State*, 239Ark. 172, 388 S.W.2d 13 (1965).

Prior to Walker's second trial, defense counsel moved to disqualify the state trial judge on the ground that he was grossly prejudiced. The defense presented uncontradicted evidence that the judge, after granting Walker's request to go to church to be baptized, had instructed the sheriff that if Walker "made a move to shoot him down, because he didn't want him brought back to him because he intended to burn the S.O.B. anyway." [R. II, 83.] [2] The trial judge declined to recuse himself. During the retrial, he made a number of rulings and comments adverse to Walker.

Before the second trial, defense counsel obtained disclosure of ballistics evidence demonstrating that Vaughan, not Barentine, had shot Walker. Consequently, the State changed its theory at the second trial and contended that Walker fired first, and that Vaughan, although fatally wounded, managed to shoot Walker five times before he died. To support this theory, the State adduced essentially the same evidence as at the first trial. However, Linda Ford was not present at the second trial. The prosecution claimed that she was unavailable, and over defense counsel's objections, read her testimony from the prior trial into the

record. The defense was thus unable to cross-examine Ford in light of the State's altered theory. The jury again convicted Walker of first degree murder, but sentenced him to life imprisonment. The Supreme Court of Arkansas affirmed the conviction. *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), *cert. denied*, 386 U.S. 682, 87 S.Ct. 1325, 18 L.Ed.2d 403 (1967).

Walker then filed his first petition for habeas corpus relief alleging, *inter alia*, that the trial judge was biased and that the prosecution had suppressed testimony of cabdriver Aaron Paul Alderman which would have been highly favorable to Walker. At the habeas hearing, Alderman testified that Kumpe had scrambled underneath the Oldsmobile when the shooting started. [H. I, 142.] Alderman claimed that he saw Vaughan fire several shots at Walker [H. I, 155], and that Vaughan remained standing after Walker had fallen to the ground. [H. I, 142.] There was a momentary lull in the shooting, and then Alderman heard a final shot which had a hollow, muffled sound—as though it had been fired from a barrel or pipe. [H. I, 141.] Vaughan fell immediately after that shot. The police then told Kumpe to come out from under the car. [H. I, 142.] Alderman testified that he removed the fully-loaded gun from Walker's hand. As he walked away, he saw another gun near the rear end of the Oldsmobile where Kumpe had been during the exchange of gunfire. [H. I, 145.]

Alderman gave his statement to police immediately after the shooting. [H. I, 146.] Although he moved to Florida a month or two later, he claimed that he called the "criminal court office" or the prosecuting attorney's office before the first trial to advise of his location and availability as a witness. [H. I, 169-70.] However, he was never called as a witness or notified about Walker's trials.

The district court (Judge Henley) questioned Alderman's credibility on the issue of suppression because no written statement by Alderman had surfaced, he was

unable to remember details about where and how he gave his statement, [3] and he could not identify the person he called to advise of his availability as a witness. *Walker v. Bishop*, 295 F.Supp. 767, 779 (W.D. Ark. 1967). The habeas court noted, moreover, that Alderman's account of events varied from that of other witnesses. *Id.* The district court denied the writ, concluding *inter alia*, that it was not convinced that the State had suppressed Alderman's testimony, and that the prejudice of the trial judge was not sufficient to deny Walker due process. A panel of this court affirmed the judgment of the district court. *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969).

The present litigation originated in 1981 when Walker filed a second application for habeas relief. The district court (Judge Woods) ruled that four of the seven claims asserted by Walker in his second petition had previously been determined adversely to him in his original application for habeas relief. The court considered the guidelines for successive habeas petitions set forth in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) [4] and concluded that because the prior determinations were on the merits, no intervening change in the law had occurred, and Walker had presented no new evidence, the "ends of justice" would not be served by reconsideration of the same claims. *Walker v. Lockhart*, 514 F.Supp. 1347, 1350-51 (E.D. Ark. 1981). The trial court permitted Walker to present evidence on his newly asserted claims, but found the additional grounds to be without merit [5] and denied the writ.

On appeal, following arguments before a panel of this court, the case was referred to the court en banc. The court requested additional briefing on several issues, including whether the constitutional violations alleged (prejudice of the trial judge, suppression of evidence, or other violations) had grossly flawed the guilt determination in this case. After an en banc hearing, this court affirmed the judgment of the district court, holding that Walker had failed to show

that the ends of justice required reconsideration of issues determined adversely to him in his first habeas application.

The four dissenting judges concluded that a great injustice had been done, and that Walker was entitled to habeas relief. In particular, the dissent emphasized that the admitted prejudice of the trial judge had deprived Walker of a fair trial, that the prosecution had suppressed evidence favorable to Walker, and that "the record as a whole indicates the strong probability that Walker did not shoot Vaughan." 726 F.2d at 1252. [6]

Judge Arnold, although voting with the majority to deny the writ, agreed in a concurring opinion that Walker had been tried before a prejudiced trial judge. He pointed out that "[i]f due process means anything, it means a trial before an unbiased judge and jury." *Id.* at 1249. Judge Arnold further indicated that he disagreed with this court's 1969 decision denying Walker's first habeas petition. He noted, however, that mere disagreement is not enough to justify granting relief on a successive habeas application. Something more is required, such as a change in the law or "new evidence unrevealed at the time of the first habeas proceeding." *Id.* at 1250.

In sum, notwithstanding the denial of relief, a majority of the en banc court concluded that this court erred in 1969 when it denied Walker's application for habeas relief because Walker had not received a fair trial before an unbiased judge.

After issuance of our mandate denying the writ of habeas corpus, Walker, on March 15, 1984, filed a petition for recall of mandate on the ground that new evidence about the crime had surfaced. That evidence came in the form of a diary entry written in 1968 by Russell Kumpe, Walker's companion on the night Officer Vaughan was killed. The entry indicated that Kumpe fired a gun at or near the time Vaughan was shot. In addition, Walker's counsel offered to

prove that Kumpe admitted to his former wife that he, not Walker, shot the officer. In response, the State indicated that it possessed a tape-recorded statement, which it had never offered into evidence, in which Walker allegedly confessed to the crime.

We granted the motion for recall of mandate by a divided vote. The order recited in part:

> The case is remanded to the district court with instructions to take evidence from Russell Kumpe and his former wife, Peggy Davidson, relating to Kumpe's alleged firing of a gun at or near the time that Officer Vaughan was shot on the night of April 15-16, 1963. That evidence is to include the diary entry apparently dated January 16, 1968, relating to that incident.
>
> On remand, the State may offer as evidence the recorded confession of Walker allegedly made after his first trial. Walker may offer evidence to explain that alleged confession.
>
> The remand proceedings may be limited to the receipt of the evidence mentioned by both sides in their papers with respect to the recall of mandate, including the Kumpe statements and the recorded confession of petitioner and any explanation thereof and such additional evidence as the district court in its discretion may deem relevant to these proceedings.
>
> The district court should determine whether any of this evidence is credible enough to deserve the attention of a jury; whether the evidence would be admissible if a new jury trial were held; and whether the new evidence, when considered against the background of the existing record, sufficiently tips the balance of the "ends of justice" standard to require that a new trial be held. These findings should then be certified to this Court, sitting en banc, which can then consider, after briefing and oral argument, whether the new evidence, in the light of the district court's findings, requires a new trial.

726 F.2d at 1265.

Judge Arnold, in a separate concurrence to the order recalling the mandate, observed that if the new evidence could establish that Kumpe had in fact fired his gun on the night in question, such evidence would give credibility to Alderman's account of the shooting, which exonerates Walker and which has never been heard by a jury. 726 F.2d at 1266. Judge Arnold concluded that the new material "sufficiently adds to the uncertainties of this case to justify additional proceedings." *Id.* at 1267.

Pursuant to our instructions, the district court held an evidentiary hearing in October 1984. The court heard testimony from some thirty witnesses, and considered the evidence specifically mentioned in our remand order, as well as additional evidence which surfaced after the recall of mandate. The district court concluded that the record contained no credible evidence which merited a new trial; that only part of the new evidence would be admissible if another jury trial were held; that Walker's right to due process had not been violated by the suppression of exculpatory material; and that the new evidence did not sufficiently tip the balance of the "ends of justice" standard to require that a new trial be held. *Walker v. Lockhart*, 598 F.Supp. 1410 (E.D. Ark. 1984).

This matter is now before us for further review in light of the evidence presented and the district court's findings.

II. DISCUSSION.

The question before this court is whether the new evidence sufficiently tips the balance of the ends of justice standard to permit us to reconsider the merits of the claims raised in Walker's first habeas petition. We must assess, among other things, the admissibility and credibility of the evidence presented, but as to credibility, the issue is not whether the district court or this court would find the new

evidence credible, but whether the evidence possesses sufficient credibility that it should be heard by the real fact-finder: the jury. [7]

A. Evidence Considered Under The Ends of Justice Standard.

1. Kumpe's Testimony.

Russell Kumpe, who did not testify at any of the prior proceedings in this case, [8] appeared at the evidentiary hearing as a witness for both the petitioner and the State. Kumpe, while blaming Walker for Vaughan's death, offered a version of events inconsistent with the State's theory at the second trial that Walker fired first and Vaughan, although fatally wounded, returned the fire. Kumpe repeatedly asserted that Vaughan, not Walker, fired first. According to Kumpe, Officer Barentine ordered him to get out of the Oldsmobile, and then told him to "spread eagle the police car," which was parked directly behind Kumpe's vehicle. [T. 105] Kumpe leaned over the left front fender with both arms spread out and his stomach pressed up against the police car. [T. 20] From that position, he looked "down toward the Oldsmobile." [T. 106]

> And while I was looking down Walker cracked the door and when he did the dome light came on and I could see that he had a pistol in his hand. And about this same time Vaughan came up and he parked directly behind Barentine but slightly to the right so the two police cars were behind one another.

[T. 106] Barentine was searching Kumpe as Vaughan approached the Oldsmobile. Kumpe warned Vaughan that Walker had a gun, and Vaughan responded "that he had a gun and he'd get the S.O.B. And as he approached the car, the door—the door came open and Vaughan shot Jim and Jim returned the fire and shot and killed Vaughan." [T. 107] Vaughan fired first; the first two flashes came from his gun, and the next flash came "[f]rom the car from where Walker

was." [T. 107] Kumpe did not actually see Walker's hand when he fired the shot; he saw only the flash of the gun. [T. 55] Kumpe swung off the police car and "took off." Barentine, who by that time had unholstered his gun, shot Kumpe twice. Kumpe ran around the police car, then looked back and saw Barentine standing near the front of the police car firing down toward Walker and the Oldsmobile. [T. 108]

Kumpe's testimony that Vaughan fired first, if believed, undermines not only the State's theory about Vaughan's death, but the credibility of Linda Ford's testimony that Walker initiated the shooting, and that testimony was crucial to the conviction of Walker. [9]

After the shooting, police found three weapons at the scene: a fully-loaded Colt .38 revolver found under the front seat of the Oldsmobile; a fully-loaded .38 caliber Smith & Wesson with a two-inch barrel found in Walker's right hand, [10] and the weapon which caused Vaughan's death, a .38 caliber Smith & Wesson with a four-inch barrel, variously described as having been found underneath Walker's body [H. I, 272], near the rear end of the Oldsmobile [H. I, 145], under the right rear wheel of the Oldsmobile [H. I, 366], and underneath the passenger's side of the car. [11] [T. 595.] Kumpe has now admitted ownership of the murder weapon. [T. 21-22] He also admitted that he had that weapon and the Colt .38 in his possession on the night in question. [T. 21-24, 112.] Kumpe claimed that he left both weapons in the Oldsmobile. [12] [T. 22.] Yet, several witnesses testified at the hearing that Kumpe told them he was armed when he got out of the car. [13] [T. 174-75, 207, 240, 278.] Although Kumpe denied making any such statements, a jury could reasonably infer from the testimony of these witnesses and other new evidence adduced at the hearing that the gun that killed Vaughan was in Kumpe's—not Walker's—possession at the time of the shooting.

2. Kumpe's Diary Entry.

In November 1983, while cleaning out a closet, Russell Kumpe's former wife, Peggy Davidson, found a box containing some of Kumpe's belongings. Included among the belongings was a diary written by Kumpe in 1968 while he and Walker were inmates in the Arkansas Penitentiary. The diary entry for January 16, 1968, reads in pertinent part as follows:

> Awakened at 1:30 A.M. by nite sheriff—Told only to go to Mr. O's office—Emergency. A great deal of agitating being done by James Dean Walker. *I look at him and feel much remorse that I fired too high on 4-16-63.* He, according to rumor has vowed that he will kill me at the first opportunity. I do not underestimate his potential, but am not alarmed.

[Pl. Exh. 1] (emphasis added).

The authenticity of the diary stands unquestioned. At the hearing, Kumpe identified the handwriting as his [T. 36], and acknowledged that he kept the diary for over a year. [T. 139-40.] Although Kumpe did not deny making the entry in question [T. 39], he explained that he made a mistake when he wrote "*I* fired too high," because he meant to write "*he* fired too high" (referring to Officer Barentine). [14] [T. 41.] Kumpe offered several reasons for his alleged mistake, [15] but ultimately denied that

> any particular thing caused me to write "I" instead of "he" * * * I think it was the fact that probably that I was writing along and using the pronoun, personal pronoun "I, I, I" and when I got to that point—I'm guessing now because I was only—I wrote "I" instead of "he" * * * And I can't give you a better answer than that.

[T. 138.]

The district court characterized Kumpe's explanation that he substituted "I" for "he" as "somewhat dubious."

Walker v. Lockhart, 598 F.Supp. at 1428. Whether a jury would credit his explanation remains to be seen. [16] What is clear, however, is that the diary provides admissible evidence that Kumpe said he fired a shot on the night in question. *See id.*

3. Kumpe's Statements to His Former Wife.

Peggy Davidson, who was married to Kumpe from 1968 to 1975, testified that Kumpe told her on two or three occasions that he was armed at the time of the shooting. [T. 180.] On one of those occasions, in the presence of Davidson and two other people, Kumpe stated that he had a gun in his pants when he got out of the car which Barentine missed during the search, and that he, Kumpe, fell down under the Oldsmobile after the shooting started. [T. 175, 178.] During that conversation, Kumpe did not say whether he had fired any shots. [T. 177-78.] Afterwards, however, when they were alone, Davidson recounted that she said to Kumpe: " 'Russell, you shouldn't tell that. The way you tell that,' I said, 'it sounds like you did it.' And he kind of grinned and he said, 'I did.' " [17] [T. 178.] According to Davidson, Kumpe told her on another occasion that "he only made one mistake. He didn't kill James Dean Walker too." [T. 179.]

The district court found that Peggy Davidson's testimony should be viewed with skepticism because of her apparent animosity toward Kumpe and her sympathy for Walker. 598 F.Supp. at 1428. Yet this important testimony, supported by Kumpe's diary entry, is certainly credible enough to deserve the attention of a jury.

It may be that Kumpe's diary and his statements to Davidson and others, as hearsay, would not be admissible as substantive evidence at a new trial. Nevertheless, such evidence could at least come before the jury for purposes of impeachment. It is reasonable to assume that if the State retries Walker, Kumpe would again be called as a witness,

and that he would be available to testify. [18] Having testified fully at the October 1984 hearing, Kumpe has waived his right to claim the privilege against self-incrimination. Nor could he now claim (as he did to avoid testifying at Walker's first two trials) that he has no memory of the events in question. Presumably the State, having characterized his testimony as "critical" [Appellee's Brief at 4], would call Kumpe to give his account of the events surrounding Vaughan's death. On cross-examination, the defense could ask Kumpe whether he fired a gun that night. If Kumpe's answer is no, he could then be asked about the diary entry, and about other newly discovered evidence indicating that he fired a weapon that night. If Kumpe admits the diary entry and other statements now attributed to him, then, as Judge Arnold explained in voting to recall the mandate,

> the fact of these prior inconsistent statements would then be before the jury, together with whatever explanation Kumpe might wish to offer. If, on the other hand, he denies making the alleged prior inconsistent statements, extrinsic evidence of these statements, including the diary itself and the testimony of Kumpe's former wife, could be offered for impeachment purposes. See Jones, Case Note, Roberts v. State: *A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements*, 37 Ark.L.Rev. 688 (1984). In either event, the jury would know about the diary entry and the alleged oral admissions. It would have an opportunity to observe Kumpe in person and to assess his credibility in light of all the circumstances, including the prior inconsistent statements. Ordinarily, newly discovered evidence is not sufficient to justify new proceedings if it goes only to the credibility of a witness, but this case is so evenly balanced that this sort of impeachment of Kumpe's credibility could well be decisive in the mind of the jury.

726 F.2d at 1266.

Even if the State does not call Kumpe as a witness, the defense may do so. The State argues, citing *Allen v.*

State, 281 Ark. 1, 660 S.W.2d 922, 924 (1983), that Arkansas law does not permit a party to call a witness merely to lay a foundation for a prior inconsistent statement. However, in the present case, the defense would undoubtedly wish to call Kumpe not merely for impeachment purposes, but for the substantive purposes of establishing that Vaughan fired first and that Kumpe owned the murder weapon and had it in his possession on April 16, 1963. On cross-examination, Kumpe would very probably offer his account of the shooting. The defense would then, on redirect, have an opportunity to impeach Kumpe with his prior inconsistent statements. [19]

4. Walker's Alleged Confession.

a. The Walker-Karam Tape.

In May, 1964, shortly after he was convicted and sentenced to death at his first trial, Walker agreed to make a tape-recorded statement for Jimmy Karam, a member of the Gideons. While in jail, Walker had undergone a religious conversion and had been baptized. Karam wanted to obtain Walker's personal testimony for use by Billy Graham and by the Gideons at church meetings and revivals "to help young people not to fall by the wayside" as Walker had done. [T. 558.] The tape, which was intended to show Walker's conversion and repentance, was recorded by a state police officer at the Pulaski County Jail. The original tape has apparently been in the possession of the Arkansas State Police since May 1964. [T. 525.] In the course of his testimony as a born-again Christian, Walker says, among other things:

> And I come to Little Rock, Arkansas, and again, I was drinking and that led to a fight up here in a nightclub. Now it's led to murder. I killed a man out here, plus . . . it's probably late now to say that it wasn't done intentionally, but it wasn't. * * * One day we were having a prayer, and I asked the Lord to forgive me if he could

> for my sins that I committed because I had committed I can say, ah, every sin imaginable . . . stealing up to adultery, fornication . . . murder even.
>
> * * *
>
> Yes, I know it's hard on you to take a life . . . Her [Mrs. Vaughan's] husband's dead and that in some way, I don't know how, I would like to tell her that . . . I know "I'm sorry" doesn't say very much, but . . . that's how . . . it's a terrible thing to have happen."

[Def. Exh. B.]

Although the taped statement was available to the State at the time of Walker's second trial, the State did not attempt to offer it into evidence. Thus, while the tape is new to us, it is not new to the parties, nor is it newly discovered evidence in the same sense as Kumpe's statements. Nevertheless, on remand we authorized the State to offer the alleged confession into evidence.

At the hearing, Walker did not deny having made the statements quoted above. He explained, however, that the statement he recorded for Karam "was never meant to be any kind of a confession to murder * * * [o]r to shooting Officer Vaughan." [T. 657.] Rather, Walker intended only to indicate his acceptance of moral—as distinguished from legal—responsibility for Vaughan's death [T. 650], a responsibility which he accepts to this day.[20] [T. 642.] He explained that, regardless of what actually happened at the scene, he was morally responsible for the whole chain of events leading up to a man's death, and his acceptance of that responsibility, as reflected in his statement, was part of his acceptance of Christian teaching.[21] [T. 641-42.] With respect to the tone of the tape and his mode of expression, Walker recounted that, just prior to the taping, Karam encouraged him to make the testimony as powerful as possible so that it would have the greatest impact on young people. [T. 649.] In fact, during the taping, Karam encouraged

Walker to elaborate more and " '[b]eef it up' a little bit, so to speak." [T. 654.]

Walker further explained that, from the time he woke up in the hospital to the time of his first trial, he did not know whether or not he was directly responsible for Vaughan's death. As soon as he regained consciousness, he was told that he had killed a policeman. [T. 630-31.] He remembered being

> thoroughly confused. I began to search my mind on the events that had happened and I knew that I could not remember firing a shot, and I kept searching my mind as to the possibility that maybe in the process of being shot, maybe I could have fired a round reflexively. But I, I could not recall firing, no.

[T. 631.] During the months before his first trial, Walker considered the possibility that, as he was being shot, he might have squeezed the trigger as a reflex action. [T. 675.] But at his first trial, when Walker learned for the first time that the gun removed from his right hand was fully-loaded, he knew (he says) that he could not have shot Vaughan because he only had one gun. [22] [T. 693.]

The district court found that Walker's explanation for his apparent admission "did not ring true." 598 F.Supp. at 1429. Yet a jury might accept Walker's explanation for his statement to Karam. A jury would, moreover, view all of Walker's statements in the context of the record as a whole, including Alderman's testimony and some of the newly discovered evidence which suggest that someone else may have fired the bullet that killed Vaughan.

The district court, after hearing the evidence on remand, attached particular significance to the idea that Walker could have shot Vaughan reflexively. The court noted that if Vaughan opened fire, it is "logical that Walker would return the fire either deliberately or by reflex action

after Vaughan shot him." *Id.* at 1429-30. The trial judge's statement carries with it the implication that if Walker fired a gun at all, he may have done so unintentionally, in which case the crime committed did not amount to first degree murder. The trial judge's suggestion is thus completely at odds with the theories advanced by the State at either of Walker's trials. *See ante*, at 945-946.

b. The Carnahan Testimony.

Ray Carnahan testified that in 1973, when he served as a Highway Patrolman, he and his immediate superior, Bill Skipper, drove Walker from an Arkansas prison facility to a Little Rock church for a speaking engagement. According to Carnahan, Walker stated on the way there that "he had gotten into the wrong crowd as a young man and that one thing led to another and the night that the officer was killed that he didn't want to go to jail and he shot the officer." [T. 152.]

Walker denied ever telling anybody that he shot Officer Vaughan. [T. 664, 674.] Bill Skipper, who was driving the car and who sat next to Carnahan, remembered that a conversation took place during the drive, but did not remember that Walker said he shot anyone. [T. 160-62.] The credibility of Carnahan's story again would be a matter for the jury.

After carefully reviewing all of the evidence presented at the hearing, we conclude that a significant portion of that evidence bears on the question of Walker's guilt or innocence, that it would be admissible if a new trial were held, and that it is credible enough to be heard by a jury. [23] Although not all the evidence produced in response to our order of remand is favorable to Walker, when considered against the backdrop of the existing record, the evidence creates sufficient additional doubt about Walker's guilt to tip the balance of the ends of justice standard and permit reconsideration of claims previously determined by a panel

of this court. [24] Of particular importance is Kumpe's admission that he owned the gun identified as the murder weapon, and the evidence that Kumpe fired a gun on the night in question, as indicated by the testimony of his former wife, and his own diary entry of January 16, 1968.

Because Walker has established that the newly discovered evidence justifies reconsideration of his claims, he is entitled to habeas relief. In our recent en banc opinion, both the majority and the dissent thoroughly considered the merits of Walker's claim that the bias of the trial judge deprived him of a fair trial. Five of the judges of the en banc court agreed that Walker had been tried before a biased judge and had, therefore, been deprived of his right to due process. *See In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Four of the judges (Lay, Heaney, Bright, and McMillian) voted to grant habeas relief. The fifth judge, Judge Arnold, voted with the majority to deny relief because the ends of justice standard had not been satisfied. Upon the additional record, a majority of the en banc court is now satisfied that we may review Walker's claims, and that the merits require reversal of the denial of Walker's successive petition for habeas corpus relief.

B. Suppressed Evidence: The Kumpe-Eisner Transcript.

Less than a week before the October 1984 hearing began, the State turned over to Walker's counsel a most extraordinary and revealing piece of evidence: a transcript of a surreptitiously recorded conversation between Russell Kumpe and his sister, Mildred Eisner (now deceased). The conversation occurred during one of Ms. Eisner's visits with her brother at the Arkansas Penitentiary. The eleven-page transcript of the conversation [25] dated November 12, 1963, includes the following statement by Kumpe:

> Now look, I am going to explain something to you. You understand that I did shoot at that policeman and he

> will go crazy trying to figure out what happened to the gun. If they place the gun in my hand naturally they could, no, they couldn't either cause [sic] I had been back in his custody, I don't know what they could have done and at the time I didn't care fro [sic] everybody was shooting at everybody else and I had some things on me that would have got me a hundred years. I had to get rid of them.

[Pl. Exh. 2.]

Walker contends that the Kumpe-Eisner transcript contains exculpatory evidence, that it has been in the State's possession for over twenty years, and that the State's failure to disclose it—despite sweeping discovery requests and a 1967 court order directing the State to turn over all material held on James Dean Walker—creates an independent basis for granting habeas relief. We agree. Although the transcript is relevant to the "ends of justice" analysis, the State's suppression of this exculpatory material constitutes a separate and independent ground for relief which we now review for the first time. [26]

1. Authenticity of the Transcript.

As a threshold matter, we must consider whether the transcript has been sufficiently authenticated to be admitted into evidence. The district court rejected Walker's efforts at authentication, and found the transcript to be inadmissible hearsay. We disagree.

Rule 901(a) of the Arkansas Rules of Evidence provides: "[T]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ark. Stat. Ann. §28-1001, Rule 901(a) (Repl. 1979). The nature of the document itself and the location in which it was found, together with Kumpe's own testimony, establish adequate authentication to render the transcript admissible.

Paul McDonald, now Chief Firearms Examiner for the Arkansas State Crime Laboratory, and formerly head of the Criminal Investigation Division of the Arkansas State Police, had possession of the transcript. McDonald testified as a ballistics expert at both of Walker's trials and at Walker's 1967 habeas proceeding. At the October hearing McDonald testified that the State prosecutor, Wilbur C. Bentley, contacted him in February or March of 1984, and asked him to search his files for any information about the Walker case. [T. 444.] While looking for the Walker-Karam tape, McDonald found the Kumpe-Eisner transcript in a box of files that had formerly been in a locked cabinet. [27] [T. 447.] McDonald stated that he did not know where the document came from or how long it had been in his files. [T. 455.] Yet his testimony suggests that the transcript probably came into his possession through a "liaison man" stationed by the Arkansas State Police at the Penitentiary where Mildred Eisner visited Kumpe. Such liaison men passed along information about criminals and criminal activities to interested departments or state criminal investigators. [T. 435-36.] Although the transcript was the first taped conversation McDonald ever recalled receiving from a liaison man, he recognized that the document originated at the Penitentiary. [T. 495-96.]

In any case, Kumpe's own testimony, viewed objectively, served to authenticate the transcript. He testified that he had several conversations at the Penitentiary with his sister during which the two discussed a number of topics contained in the document. [T. 67-72; 126-27.] Kumpe did not deny making the statement "you understand that I did shoot at that policeman," although he could not recall his exact wording. [T. 73, 77.] After looking over a copy of the document, Kumpe said, "I don't recall whether or not I said everything in here. But since it's in the document or it's in the transcript, I will say that I probably said it then, and if I did, I was pressuring my sister to take what I would call a little more expedient action." [28] [T. 75.]

Thus, besides confirming that the transcript reflected the general nature of his conversation with Eisner, Kumpe as much as admitted making the statement that he shot at Vaughan. In addition to the content of the document, the apparent age of the paper, its date, and the location in which it was found tend to support its genuineness. Under these circumstances, we conclude that the evidence overwhelmingly supports a finding that the document is authentic, and that the district court's finding to the contrary is clearly erroneous.

Although the transcript is hearsay, it would be admissible for impeachment purposes on the same basis as Kumpe's diary entry. In addition, it may also be admissible as substantive evidence under Rule 803(16) of the Arkansas Rules of Evidence, which creates an exception to the hearsay rule for a "[s]tatement in a document in existence twenty [20] years or more the authenticity of which is established."

2. Violation of Walker's Due Process Rights By Suppression of Evidence.

Walker argues that the State, in failing to disclose the transcript, violated his due process rights by suppressing exculpatory material. In order to establish a due process violation, Walker must show: (1) that the evidence was indeed suppressed, (2) that it was favorable to Walker, and (3) that it was material. *See Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2567-68, 33 L.Ed.2d 706 (1972). *See also Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). It is irrelevant whether the State acted in good faith or bad faith in failing to disclose the evidence; negligent suppression may be sufficient. *See id.* at 87, 83 S.Ct. at 1196. The prosecutor, however, undertakes no obligation to provide defense counsel with unlimited discovery. The prosecutor violates his constitutional duty of disclosure only if "his omission is of sufficient significance to result in the denial of the defendant's right

to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). In cases such as this where the defendant has made general requests for all exculpatory material, the conviction will be set aside only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112, 96 S.Ct. at 2402. The undisclosed material must therefore be evaluated in the context of the entire record. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113, 96 S.Ct. at 2402.

a. Suppression of the Transcript.

At the evidentiary hearing, a great deal of testimony was directed toward the question of when the transcript came into Paul McDonald's possession. In a videotaped interview with reporters several days before the hearing, [29] McDonald stated that he received the Kumpe-Eisner transcript while he was the head of the Criminal Investigation Division of the Arkansas State Police, a position he held from 1960 to 1965. [T. 427.] In addition to conceding that the document had been "around since 1963," he engaged in the following interchange with the reporters:

> REPORTER: You found this report only recently?
>
> McDONALD: Not recently.
>
> REPORTER: Well, here's what I want to know: Why—this is dated 1963—that's twenty-one years ago. Why is this just now being turned over to any attorney's—defense attorneys, prosecuting or anyone.
>
> McDONALD: I don't know.
>
> REPORTER: But you knew about this in 1963.
>
> REPORTER: You knew that Russell Kumpe said he fired a shot at the policeman?

McDONALD: In 1963, I did.

REPORTER: This wasn't considered crucial enough to turn over, Mr. McDonald?

McDONALD: I don't know. That came from the Penitentiary.

[Pl.Exh. 12 at 1.] McDonald added that when he received the transcript, he reviewed it before placing it in his files. He explained that he did not turn the document over to anyone because he assumed "it was common knowledge," and that he had received a copy only for his information. *Id.* at 2.

At the evidentiary hearing several days later, McDonald told a different story. He testified that he had no knowledge of the transcript at the time of Walker's trials or his first habeas hearing. [T. 479.] He recalled seeing the transcript before locating it for Bentley in 1984, but he could not remember when. [T. 460, 491.] Although he was uncertain when he received the document, he believed that it had been within the past ten years (that is, since 1974). [T. 484-86.] Yet he could not explain how a document dated 1963 would suddenly show up in his files ten years later. [T. 484-85.]

The district court assumed, without explicitly deciding, that the Kumpe-Eisner transcript was in McDonald's possession at the time of Walker's conviction, and that the prosecution had a duty to disclose the statement to the defense. 598 F.Supp. at 1432. We believe that any findings to the contrary would be clearly erroneous. Police are treated as an arm of the prosecution for *Brady* purposes, "and the taint on the trial is no less if they, rather than the state's attorney, were guilty of the nondisclosure. * * * The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused." *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964).

Althugh not all police knowledge should be imputed to the prosecution, on the record before us it is reasonable to charge the State with suppression of the Kumpe-Eisner transcript. The evidence indicates that the State Police possessed the document before Walker's second trial in 1965. The record discloses that McDonald was aware of its contents because he admits having read the document when he received it. Moreover, having testified as a ballistics expert at both of Walker's trials and at the first habeas hearing, McDonald was very familiar with the facts of the case. Even though he was not involved in the general investigation of the crime, he knew that only one of the weapons recovered at the scene had been fired. Thus, the significance of Kumpe's statement that he shot at a policeman that night should not have been lost on McDonald. Indeed, even if McDonald overlooked the significance of the statement, or incorrectly assumed that the prosecution was aware of the document, the State's constitutional obligation is not measured by McDonald's willfulness or negligence, but by the character of the undisclosed evidence. [30] *Agurs*, 427 U.S. at 110, 96 S.Ct. at 2400. In this instance, the suppressed Kumpe-Eisner transcript is both favorable to Walker and material on the question of Walker's guilt. *See ante* part II(B)(2)(b).

b. Materiality of the Undisclosed Evidence.

The district court noted that, "on the whole the transcript is not helpful to Walker. While Kumpe allegedly said he shot at 'the policeman,' it is not clear which policeman he was talking about—Barentine or Vaughan. Later in the transcript Kumpe makes statements that strongly suggest Vaughan died as a result of the shoot-out with Walker." 598 F.Supp. at 1428. The court concluded that, in the context of the entire record, "the Kumpe-Eisner statement does not create a reasonable doubt concerning the guilt of the petitioner in the shooting death of Officer Vaughan." *Id.* at 1433. In short, the district court determin-

ed that even if the transcript had been improperly suppressed, it was not material and, therefore, no due process violation had occurred. We disagree.

As this court has discussed in prior opinions, the evidence used to convict Walker was close. Therefore, "additional evidence of relatively minor importance might be enough to create a rasonable doubt." *Agurs*, 427 U.S. at 113, 96 S.Ct. at 2402. A statement by Kumpe indicating that he shot at a policeman is of more than minor importance, particularly in view of other newly discovered evidence suggesting that the murder weapon was in Kumpe's possession, and that he "fired too high."

The district court emphasized that it was not clear from Kumpe's statement whether he fired at Barentine or Vaughan. Because Kumpe added "he will go crazy trying to figure out what happened to that gun," the reference appears to be to someone who is still living, that is, Barentine rather than Vaughan. However, evidence that Kumpe fired a gun at *anyone* is exculpatory because only one of the recovered weapons (apart from the policemen's weapons) had been fired. Thus, Kumpe's admission that he "did shoot at that policeman" in effect takes the alleged murder weapon out of Walker's hand. [31]

In addition to the passage quoted above, the transcript includes the following exchange:

> EISNER: I heard from everybody that you gave them no trouble.
>
> KUMPE: I didn't until he shot me. You don't know what happened over there. I do. The policeman committed suicide, he shot Walker first. See if he don't shoot Walker then we don't have all the trouble and he is still alive. What would you do if someone shot you first?

[Pl.Exh. 2 at 7.] The district court inferred from this exchange that Kumpe was suggesting that Walker shot

Vaughan because Vaughan shot him first. Therefore, according to the district court, the transcript as a whole was not helpful to Walker. Yet Kumpe's statement could also be interpreted as indicating that he (Kumpe) did not give the police "trouble" (that is, get involved in the shooting) until after Barentine shot him. "What would you do if some shot you first?" applies to Kumpe's situation as well as Walker's.

Indeed, that interpretation is consistent not only with Kumpe's earlier statement that he "shot at that policeman," but also with Kumpe's diary entry stating that he "fired too high." Furthermore, that interpretation tends to corroborate Alderman's testimony at the first habeas hearing suggesting that Kumpe fired a gun while under the Oldsmobile. *See Walker v. Lockhart*, 726 F.2d at 1258. In fact, the Kumpe-Eisner transcript not only lends credibility to Alderman's account of events exonerating Walker, it lends credence to the theory that the prosecution suppressed Alderman's testimony. *See Id.* If, at the time of the original habeas proceeding, the district court had known about the suppression of the transcript, as well as about the other new evidence that has surfaced, it might have made a substantial difference in that court's factual analysis.

In sum, the Kumpe-Eisner transcript constitutes powerful corroboration of newly discovered evidence favorable to Walker which we asked the district court to consider on remand. Although the transcript may be weighed into the balance under the ends of justice standard, it also provides an independent basis for setting aside Walker's conviction. We conclude that the transcript itself, when considered in the context of the entire record, is sufficient to create a reasonable doubt about Walker's guilt. Suppression of the document therefore constituted a violation of Walker's due process rights.

III. CONCLUSION.

[19] After careful review of the record, we conclude that the newly discovered evidence sufficiently tips the balance of the ends of justice standard to permit this court to reconsider Walker's habeas petition, specifically his claim concerning the bias of the state trial judge. Although none of the evidence presented at the remand hearing relates to the state trial judge's actions, the evidence casts sufficient doubt on the factual basis for Walker's conviction to justify reexamination of our prior legal conclusions. We now hold that the trial judge's bias deprived Walker of a fair trial. Walker is therefore entitled to habas corpus relief. The suppressed Kumpe-Eisner transcript, ahtough relevant to the ends of justice inquiry, provides an independent basis for granting Walker's petition for relief.

[20, 21] The dissent asserts that the court is granting a writ on the basis of newly discovered evidence. That is not the case. We quite agree with the dissent that a claim of newly discovered evidence relevant only to guilt is not a ground for habeas relief. The federal habeas power goes only to the constitutionality of detention, not to the question of guilt or innocence. In this case, Walker's detention is unconstitutional not because new questions have been raised about guilt or innocence, but because the judge who tried his case was prejudiced against him. The newly discovered evidence is relevant only because it casts sufficient doubt on the factual basis for the conviction to justify reexamination of a legal ground (bias of the trial judge) previously rejected by this court.

The dissent further suggests that the court has summarily concluded that bias supports granting the writ without any analysis or review of prior decisions reaching a different conclusion on this issue. Again, that is not the case. In the previous en banc opinion of this court, four dissenting judges and Judge Arnold in his concurring opinion considered the merits of the bias issue and concluded

that Walker did not receive a fair trial before an impartial judge. *See* 726 F.2d at 1249 (Arnold, J., concurring), and 1258-60 (Bright, J., dissenting, joined by Lay, C.J., Heaney and McMillian, J.J.). The newly surfaced evidence gives us the power, in order to attain the ends of justice, to reach the bias question. The state trial judge's statements about Walker's forthcoming trial stand undisputed, particularly the judge's statement that he "intended to burn the S.O.B. [Walker] anyway." In no way can that statement be squared with the requirement that a defendant be tried before a fair tribunal. We need not repeat all of this court's prior discussions on this point. Given the undisputed expression of prejudice by the state trial judge (Judge Kirby), the previous legal conclusion, which we readopt, that Walker was tried before a prejudiced judge impels us to grant the writ. [32]

In his concurrence to this court's en banc decision, Judge Arnold emphasized that, although justice to the petitioner is crucial in our system, we must consider as well the State's right to fairness, and the effect on the State of granting this writ. 726 F.2d at 1250. We agree. We note, however, that at the remand hearing, the Attorney General of Arkansas remarked that the State had come before the disrict court "seeking to do justice," and that if the court recommended a new trial, the State wins because justice has been done. [T. 13.] We are convinced on the record before us that Walker's trial and conviction before an admittedly prejudiced trial judge constituted a gross miscarriage of justice. Retrial of Walker after more than two decades might present some difficulties for the State, but none that would seriously prejudice the prosecution. Many of the State's witnesses are still available, notably Barentine and McDonald—and now Kumpe as well. Testimony of witnesses no longer available has been preserved on the record and presumably could be offered in record form as it was for witnesses said to be unavailable at the time of Walker's second trial. Surely here, where justice has been

so long delayed, the equities weigh heavily in favor of correcting this stain on our criminal justice system.

Accordingly, we conclude that James Dean Walker is entitled to habeas corpus relief. We direct the district court to grant the writ unless the State of Arkansas commences proceedings to retry Walker within ninety days from May 17, 1985, the date of this opinion.

LET OUR MANDATE ISSUE FORTHWITH.

1
The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

2
References to the record of Walker's first trial will be designated throughout this opinion as R. I, ____; references to the record of his second trial as R. II, ____; references to Walker's first habeas corpus proceeding will be designated as H. I, ____; and references to the transcript of the October 1984 evidentiary hearing as T. ____.

3
The district court acknowledged, however, that other investigative statements taken from witnesses were missing, and that "Alderman told a story of some sort" to officials. *Walker v. Bishop*, 295 F. Supp. 767, 779 (W.D. Ark. 1967).

4
In *Sanders*, the Supreme Court established guidelines governing consideration of successive petitions for habeas corpus relief. When a successive application raises grounds previously heard and determined, a court need not reconsider those grounds if they were (1) "determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15, 83 S.Ct. at 1077. When the successive application presents a different ground, or if the same ground was presented earlier but not adjudicated on the merits, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * *." *Id.* at 17, 83 S.Ct. at 1078. See *Walker v. Lockhart*, 726 F.2d at 1241-43, for a more thorough discussion of the *Sanders* criteria.

5
On appeal, Walker did not seriously urge error with respect to the findings on these additional grounds, and, as this court noted, the trial court's determinations on the new claims were not clearly erroneous. 726 F.2d at 1249.

6
Judge Heaney served on the panel of this court which denied Walker relief in 1969. He joined the dissent on Walker's second petition, and joins with the majority in this opinion, underscoring his strong belief that the previous panel erred, and that only by granting Walker habeas relief can we right a grevious miscarriage of justice.

7
The dissent suggests that the court has ignored the district court's finding that the newly discovered evidence is not sufficiently credible to deserve the attention of a jury. *Post*, at 964. Although we directed the district court to make that determination in our remand order, the district judge seems instead to have made his own assessment of the credibility of the evidence. *See* 598 F.Supp. at 1430. However, to the extent that the district court did make a factual determination on the lower threshold question of whether the evidence was at least sufficiently credible to be heard by a jury, we believe that the court's determination that the evidence did not meet that minimal level of credibility is not plausible in light of the record viewed in its entirety, and is therefore clearly erroneous. *See Anderson v. City of Bessemer City*, ___ U.S. ___, ___, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

The dissent further asserts, relying on *Jones v. United States*, 279 F.2d 433 (4th Cir. 1960), that, in assessing whether newly discovered evidence is sufficiently credible to be heard by a jury, we have drawn an unwarranted distinction between the *Sanders* ends of justice standard and Rule 33 motions for new trial. *Post*, at 965 n. 4. *Jones*, however, was not a habeas case and did not involve a successive petition. Moreover, it was decided three years before the Supreme Court formulated the ends of justice standard in *Sanders*. In *Jones*, the court was faced with a motion for a new trial. In addition, the trial judge in *Jones* had heard all of the evidence, unlike the present case in which Judge Woods, who was not the trial judge or the district court judge in the first habeas proceeding, has not heard all of the evidence. Thus, contrary to the dissent's assertion, *Jones* is neither persuasive nor illustrative.

8
At the hearing, Kumpe stated that when the prosecutor asked him about testifying at Walker's trials, he indicated his unwillingness to do so. "[The prosecutor] told me that he was going to subpoena me and put me

on the stand and if I lied he'd charge me with perjury. And I distinctly remember telling [him] that I was aware he could put me in jail for lying but he couldn't do anything to me for having a bad memory and I had no intention of testifying." [T. 94.]

9

It is worth noting that cabdriver Thomas Short did not actually see Walker fire. [H. I, 300.] In addition, Barentine testified at the 1984 hearing that he did not see Walker fire a shot. [T. 587.]

10

No witness has testified to seeing Walker with more than one gun at the time of the shooting.

11

Importantly, at the October 1984 hearing, Officer Barentine authenticated a police report he filed on April 16, 1963, which stated: "We removed the gun from [Walker's] hand then found another gun underneath the passenger's side of the car on the ground." [T. 594-95.]

12

Kumpe testified that when he and Walker left the Little Rock area, he put one of the guns in his waistband and the other on the front seat of his car. He further testified that, before he got out of his car, he placed the gun that had been in his waistband under the driver's seat.

13

According to the witnesses, Kumpe said that the gun was in his waistband, but Barentine missed it when he frisked Kumpe because Kumpe pressed himself hard against the police car, and Barentine had not completed the search when the shooting began. To refute the witnesses' testimony, Kumpe claimed that Barentine's search had been thorough enough not to have missed a gun in Kumpe's waistband. [T. 132-33.] Barentine testified, however, that he had not completed his search when the shooting began [T. 587.], and that he shot Kumpe because he did not know whether or not he was armed. [T. 602.]

14

Although the entry contains no other reference to Barentine, Kumpe offered the following explanation for his contention: "Well, Mr. Barentine was firing rather wildly and he certainly was shooting over Mr. Walker if Mr. Walker is in the position where he was, and he's shooting through the Oldsmobile so certainly he's firing too high." [T. 54.]

15

Kumpe variously suggested that the mistake was the result of writing the diary with his hand inside a desk drawer [T. 40], writing the

entry hurriedly and in poor lighting [T. 124], and writing the entry after a brief encounter with Walker that left him agitated. [T. 136-37.]

16

A jury might deem it significant that Kumpe chose the word "remorse" to describe his feelings about firing too high. "Remorse" usually reflects the feeling a person has about his *own* acts or omissions, not the acts of others.

17

Kumpe denied making this response and asserted that he had once responded to a question from Davidson about the possibility that Walker might be innocent by saying, " 'Well, Christ, Baby, there were only three people out there. If [Walker] didn't do it and the policemen didn't do it,' I said, 'that only leaves me.' " [T. 87.]

18

Kumpe is presently an inmate in the Arkansas prison system. If, however, Kumpe is unavailable for some reason at the time of a new trial, the diary and his alleged statements might be admitted under the hearsay exception for declarations against penal interest. Ark. Stat. Ann. §28-1001, Rule 804(b)(3) (Repl. 1979).

19

Under Arkansas law, a party may impeach his own witness by use of a prior inconsistent hearsay statement. *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44, 45 (1983). However, the probative value on the issue of impeachment must outweigh "the prejudicial effect arising from the danger that the jury will give substantive effect to the prior inconsistent statement." *Id.* in *Roberts*, the Arkansas Supreme Court ruled that the impeachment should not have been allowed because the danger was too great that the defendant would be convicted on the basis of unsworn testimony. No such danger exists with respect to the impeachment evidence in question here. Rather, the evidence would go to impeaching the credibility of a witness who has claimed to be "the only person that actually knew what happened out there that night." [T. 46.]

20

Walker denies that either he or the Gideons for whom he made the tape intended his "Christian testimony" to be a confession of legal guilt. Near the beginning of the tape, Karam states that Walker is there to "take" the jury's verdict of murder in the first degree. Yet the Gideons were not suggesting that Walker should accept the verdict as a legal matter. In fact, the Gideons not only encouraged Walker to appeal, they retained counsel for the purpose of challenging the legal verdict. [T. 558, 657, 695.]

21

Walker also explained that, while he has never denied moral responsibility for Vaughan being killed, "[t]here's a great difference between someone being murdered and someone geting killed, and Officer Vaughan got killed that night somehow, and I simply don't know how." [T. 664.]

22

During the remand hearing, Judge Woods ascertained that Walker remembered getting out of the car with a gun in his hand. The judge then asked: "Do you think that maybe as a result of getting shot that by reflex action, it's possible that you could have shot Officer Vauthan?" Walker responded, "I have thought that that could have been possible, Your Honor." [T. 666.] When asked later if he had not essentially admitted the possibility that he may have shot Vaughan, Walker explained that his answer to the judge's question was intended only to reflect the beliefs he held prior to his first trial. [T. 675-76, 684-85, 689-90.]

23

It is worth recalling that two of the witnesses to the events in question, Kumpe and Alderman, have never been heard by a jury.

24

The dissent states that the court has ignored the district court's finding that the newly discovered evidence does not sufficiently tip the balance of the ends of justice standard to permit further consideration of Walker's claims. Whether the ends of justice standard has been satisfied is a mixed question of fact and law, and it is within the discretion of the district court to make that determination. For the reasons discussed in the text, we hold that the district court abused its discretion in concluding that the ends of justice standard has not been satisfied in the circumstances of this case. Our holding is particularly appropriate in light of two factors. First, much of the existing record in this case—all of which must be weighed in the balance under the ends of justice standard—was not made before Judge Woods, and has been thoroughly and independently reviewed by this court. Second, Judge Woods' suggested theory of the crime (*see ante*, at 954) contradicts the State's trial theory that Walker intentionally fired the first shot.

25

The tape recording itself has not surfaced. The transcript is a typed carbon copy of the heading of which indicates that it is a "recorded visit" between Kumpe and Eisner which occurred between 1:00 P.M. and 3:00 P.M. on November 12, 1963.

26

Although Walker made a suppression argument in his first habeas petition, this particular claim has not previously been raised or con-

sidered. Therefore, under *Sanders v. United States*, full consideration of the merits of the claim can be avoided only if there has been an abuse of the writ. 373 U.S. at 17, 83 S.Ct. at 1078. In the present case, Walker has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for Walker's delay in presenting this claim rested on the State's failure to disclose. In the circumstances, Walker has not waived his right to a federal hearing on the claim. The district court has, in fact, already received and considered evidence on this issue, and the memorandum opinion discusses the merits of this suppression claim at some length. 598 F.Supp. at 1430-33.

Although we review this as essentially a new claim by a state prisoner, no exhaustion problem exists. While the exhaustion rule generally is to be strictly enforced, it is not jurisdictional. *See Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The State has not argued that failure to exhaust is a problem, so that point may be deemed waived. *See Pickens v. Lockhart*, 714 F.2d 1455, 1464 n. 9 (8th Cir. 1983). In any event, even if an exhaustion problem existed, the Kumpe-Eisner transcript could still be considered as weighing into the balance under the ends of justice standard.

27

The State has offered no reasonable explanation for how this document could exist and be in McDonald's files if it were not what it purports to be. At oral argument, the following colloquy took place between Judge Arnold and the Assistant Attorney General for the State of Arkansas:

> JUDGE ARNOLD: Let's assume that Captain McDonald * * * doesn't know where it came from. Where could it have come from?
>
> MR. HOLDER: I don't know.
>
> JUDGE ARNOLD: I mean it's just not the sort of thing that happens without some color of authenticity to it.
>
> MR. HOLDER: Captain McDonald testified that he had a file drawer, cabinet or whatever that he just put things in, and he has been putting things in it since 1940 or something. The state police are more or less in an advisory position, as you know, Judge Arnold, and the State of Arkansas, on most things, on many things, unless they are specifically asked to investigate, and I am sure he's just filed all kinds of things in there. He probably couldn't tell you where a lot of it came from.
>
> JUDGE ARNOLD: * * * [W]hat I am trying to sort out, I am trying to hypothesize in my own mind some way this document

could exist and not be authentic. Who would have made up a thing like this?

MR. HOLDER: Some supporter of the petitioner, I would think.

JUDGE ARNOLD: And put it in Captain McDonald's file?

MR. HOLDER: Could have sent it to him in the mail, Judge Arnold, one of them made up something I said. * * * I am speculating, and I am also speculating that one could probably heat up some paper like that and make it look a lot older than it is.

[Transcript of oral argument at 25-27, No. 81-1700, *Walker v. Lockhart* (January 17, 1985).] The State provides us with an incredible explanation.

28

Kumpe further explained that if he made the statement to his sister, he lied to her "to pressure her into acting with a little more haste." [T. 74.] He wanted to encourage her to "get on" his attorney to "get the appeal effected and to try to have bond set." [T. 73.] It is unclear, however, why Kumpe thought his sister would expedite his release if he indicated that he was guilty of unsuspected wrongdoing.

29

The videotape and a transcript of the videotape were part of the record at the remand hearing.

30

In any event, the district court ordered the State to turn over *all* material held on James Dean Walker prior to the 1967 habeas hearing and McDonald apparently was aware of that court order. [T. 532-34.] McDonald turned over neither the Kumpe-Eisner transcript nor the Walker-Karam transcript, both of which were in his possession at that time.

31

The dissent asserts that this constitutes an "extraordinary finding" by this court. *Post*, at 964. To the contrary, we have made no finding on this matter, but have merely reflected on the entire record in this case, including the record before the court in prior proceedings which has been extensively discussed in the prior *Walker* opinions. No evidence exists anywhere in the complete record of the Walker proceedings that places the alleged murder weapon in Walker's hands or directly ties Walker to murder weapon in Walker's hands or directly ties Walker to possession of the alleged murder weapon found on the ground at the murder scene. As we have observed, Walker held an undischarged gun in his hand.

If Kumpe did fire the alleged murder weapon found at the scene, that fact would dispel any possible inference that Walker held that gun at the time of the murder.

32

We fail to see how our drawing this previous conclusion, which we decide as a matter of law, in any way constitutes an abuse of authority or power as the dissent contends. *Post*, at 967.

James Dean WALKER, Petitioner,

v.

A. L. LOCKHART, Director, Arkansas Department of Correction, Respondent.
No. LR-C-81-280.

United States District Court, E.D. Arkansas, W.D.

Dec. 6, 1984.

Oscar Fendler, Blytheville, Ark., Bill Bristow, Jonesboro, Ark., L. Gene Worsham, Chip Baker, Little Rock, Ark., Paul N. Halvonik, Berdley, Cal., for petitioner.

Steve Clark, Atty. Gen., State of Ark., Theodore G. Holder, A. Carter Hardage, Asst. Attys. Gen., Little Rock, Ark., for respondent.

HENRY WOODS, District Judge.

I. HISTORY OF LITIGATION

James Dean Walker was charged with murdering a young North Little Rock Police officer on April 16, 1963. At his trial a year later, Walker pled not guilty and not guilty by reason of insanity. As Judge Henly aptly observed in a later habeas corpus opinion, "Walker did not testify at the first trial and the Court gets the impression from reading the transcript of the trial that the principal defense relied upon was insanity; *the fact of the killing of Vaughn by Walker seems not to have been denied seriously.*" *Walker v. Bishop*, 295 F.Supp. 767, 771 note 3 (E.D. Ark. 1967).

Walker, Russell Kumpe, and a prostitute, Linda Ford, were fleeing the scene of a shooting incident at a Little Rock

night club when they were stopped by two police officers in separate automobiles. The first police automobile on the scene was drivin by Officer Gene Barentine, and the second by the deceased, Jerrell Vaughan. The subsequent events were described in the first Arkansas Supreme Court opinion, *Walker v. State*, 239 Ark. 172, 388 S.W.2d 13 (1965) written by Mr. Oscar Fendler, one of Walker's present lawyers who was serving as a Special Justice of the Arkansas Supreme Court:

> Kumpe got out of his car by order of Officer Barentine, and came to the rear of the Oldsmobile; he leaned against Barentine's police car while the officer searched him. As this was being done, Officer Vaughan approached the passenger side of the Oldsmobile from the rear; as he reached the car door, gunfire broke out.
>
> . . .
>
> Linda Ford, who was sitting in the front seat with Walker, said that he had a pistol in his hand and started firing when the door was opened. She did not know who opened the door, but the door was not open when Officer Vaughan walked up. Thomas Gerald Short, the cab driver, who was also present with the police, testified that Vaughan had bent over looking into the Oldsmobile window and said a few words. Short also stated that when the door came open, Vaughan was doing a little dance-like jig, trying to get away from the car and backed up on the side of the bank' that there was a shot and Vaughan fell on his chest; that he heard several shots; that he did not see any shots fired. He said that Vaughan had just got his gun out when he was shot.

Id. 388 S.W.2d at 14-15.

In the same opinion it was stated: "A surgeon removed the bullet from the deceased Vaughan, which was identified as having been fired by the .38 S & W 4-inch barrel pistol, which was found beneath Walker's body." *Id.*, 388 S.W.2d at 14. Walker had been shot five times and Vaughan once over

the heart. "It can be reasonably inferred that Vaughan shot Walker several times before Walker's one bullet killed Vaughan." *Id.*, 388 S.W.2d at 17. Walker's sentence of death for first degree murder was reversed, principally because the trial judge did not instruct on the lesser degrees of homicide. "This is not to say, however, that the evidence is not sufficient to support a conviction of first degree murder." *Id.*, 388 S.W.2d at 17.

The second trial was begun on November 29, 1965. Walker was convicted of first degree murder and given life imprisonment. The version of the salient events given by Justice Cobb in the second Arkansas Supreme Court opinion, *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), closely parallels that given in the prior opinion:

> Officer Barentine stopped his car directly behind the suspect car. Vaughan stopped his car behind and to the left side of the Barentine car. The driver of the Oldsmobile, later identified as Freeman Kumpe, got out and came around to the left rear of the Oldsmobile and met Barentine. While Barentine was beginning a search of Kumpe, Officer Vaughan went around the right rear of the Oldsmobile, ostensibly to check the other passengers in the car. Almost in the instant that Vaughan disappeared around the right rear of the Oldsmobile, a fusillade of gunfire erupted, the autopsy report subsequently reflecting that Officer Vaughan was killed by a bullet entering his body at the front side of his chest in the heart area.
>
> . . .
>
> She [Linda Ford] testified that appellant had a gun in his hand when he opened the right door of the Oldsmobile to meet Officer Vaughan and that appellant started shooting, being the first to fire. Appellant testified briefly in this case but at no time did he attempt to place a gun in the hands of Linda Ford. Since Kumpe was out of the car and unarmed; Linda Ford had

> no gun and Officer Vaughan was slain by a bullet fired into his body as he faced appellant, the physical facts leave little, if any, doubt as to the fatal bullet coming from a gun fired by appellant.

Id., 408 S.W.2d at 908-09.

Judge Henley analyzed the defense raised in the second trial as follows:

> It was the theory of the defense at the second trial that Vaughan was killed by a bullet fired from Barentine's gun which bullet had struck the Oldsmobile on the rear bumper and had, according to the defense, ricocheted striking Vaughan and inflicting a mortal wound. At the second trial Walker took the stand in his own defense and denied that he had fired any shots; he also denied that he had more than one gun; it was the State's theory that he had two.

Walker v. Bishop, 295 F.Supp. 767, 771.

In *Walker v. State*, 408 S.W.2d 905, 917 the Supreme Court of Arkansas affirmed the conviction of these words:

> Appellant had no known reason to fear for his personal safety when his car was caused to slow down and pull over and stop by the police car behind it. Appellant opened the car door with a drawn gun in his hand and started the shooting with deadly accuracy. There is no suggestion in this record that he did not act of his own volition and with deliberation The evidence in the case was certainly sufficient to authorize the jury in finding that appellant killed Officer Vaughan with deliberation, premeditation and malice aforethought.

The Supreme Court denied certiorari, *Walker v. Arkansas*, 386 U.S. 682, 87 S.Ct. 1325 (1967), and also denied rehearing and overruled his motion to present argument in support, 387 U.S. 926, 87 S.Ct. 2027, 18 L.Ed.2d 987 (1967).

The Honorable J. Smith Henley, then Chief Judge of the Eastern District of Arkansas, conducted an extensive habeas corpus hearing on August 28-30, 1967. It is not an exaggeration to say that Judge Henley virtually retried this case. Judge Henley's statement as to the crucial facts closely accords with that given in the two opinions of the Supreme Court of Arkansas:

> Barentine had caused Kumpe to get out of the Oldsmobile and come back to the Barentine car to be searched . . . .
>
> Vaughan left his car, walked between the Barentine car and the Oldsmobile and approached the right front door of that vehicle. That door was opened either by Vaughan or Walker and firing broke out. At the commencement of the shooting Kumpe either ran from Barentine or threw himself to the ground; Barentine fired twice at Kumpe; he then fired four shots into the Oldsmobile; reloaded and fired a fifth isolated shot into that vehicle.

Walker's case in the habeas proceeding was principally based on the testimony of two witnesses, Mary Louise Roberts and a cab driver, Paul Alderman.

Mary Louise Roberts and Linda Ford, two prostitutes, had been with Walker and Kumpe at the Little Rock night club when Walker accidentally shot one patron while pistol-whipping another. Walker and Kumpe went to their motel, packed, and checked out. In the meantime Walker called Linda Ford at her mother's apartment and requested that she join them at the motel, which she did. Mary Louise Roberts went to the motel in a cab driven by Paul Alderman. "She undertook to join the two men and the Ford woman but was ordered back into the cab. The two men and Linda Ford entered the Oldsmobile and Kumpe took the wheel; all three occupied the front seat with the woman in the middle." *Id.* at 770. Kumpe drove through North Little Rock onto a narrow highway leading to England, Arkansas,

where the vehicle was stopped by the two police vehicles. Alderman had attempted to follow but could not keep up with the Oldsmobile. His dispatcher alerted the North Little Rock police officer and instructed a cab driver by the name of Thomas Short to take up the chase. Short managed to keep contact with the Oldsmobile and arrived at the scene shortly after the police vehicles had stopped the Oldsmobile. The Alderman cab arrived a few second thereafter with Mary Louise Roberts, a passenger therein. "Mary Louise Roberts testified at the first trial that she and Alderman drove up to the other vehicles before the shooting started; however, she stated that when the firing began, she threw herself down in the back seat of the cab and did not witness the details of the shooting." *Id.* at 771.

Although the two women were subpoenaed by the State and police officials testified that diligent efforts were made to locate them, neither was served. Their prior testimony was read into the record. In the habeas hearing Mary Louise Roberts testified:

> [T]hat if she had been called as a witness at the second trial, she would have stated truthfully that she watched the entire shooting and never saw Walker do any shooting; that certain police officers knew that her second trial testimony would be favorable to the defense, and that she was made to understand that if she appeared and testified she would be subjected to repeated arrests.

Judge Henley found "that the State made good faith and reasonable efforts to locate both women." He also observed that "the fact that Roberts did not 'see' Walker firing does not mean he was not doing so." *Id.* at 776.

The other witness, Paul Alderman, who was driving the cab occupied by Mary Louise Roberts,moved to Florida shortly after the shooting and did not testify in either trial, but was a witness at the habeas corpus hearing. The

defense claimed that "had he been called, he would have given testimony which, if credited, would have entitled Walker to an acquittal; that the State knew of his potential testimony and wrongfully failed to disclose its knowledge to the defense." *Id.* at 777. Judge Henley summarized Alderman's testimony at the habeas hearing as follows:

> Alderman testified in substance that he witnessed the shooting; that he saw Vaughan shoot Walker; that when the firing commenced, Kumpe threw himself to the ground; that when the "flurry" or "flurries" of shooting died down Vaughan was on his feet, apparently unhurt; and that Walker was on the ground. Alderman proceeded to state that there was then a final shot which had a hollow, muffled sound as though fired from a can, and that Vaughan fell immediately after that shot.

Id. at 777. He noted that Alderman's testimony as to events at the shooting was quite graphic, but "when his testimony came down to facts which would bear directly on whether his testimony at the trials was suppressed he became very hazy with respect to many details which the Court thinks he would have remembered normally." *Id.* at 779.

Judge Henley denied the habeas petition and was unanimously affirmed by a panel of the Court of Appeals. *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969). The recitation of the facts in Judge Mehaffy's opinion accords with the version stated by the Supreme Court of Arkansas in its two opinions and by Judge Henley. *Id.*, at 1380-81. "Linda Ford, who was seated next to Walker, testified that Walker fired the first shot and there is no question but that Vaughan was killed by a shot from the pistol found under or by Walker's side." *Id.* at 1381.

With regard to the charge that the State had suppressed vital evidence and used false testimony to prove the conviction of Walker, the Court of Appeals stated, "Some of the charges are specious and, as will be seen, all are completely without merit." *Id.* at 1383. The Court further noted that

"the State offered defendant, on more than one occasion, any and all evidence from the State's file, which defense counsel desired . . . ." The Court of Appeals opinion pointed out that the principal complaint in connection with the charge of supression was the State's inability to serve subpoenas on the two prostitutes, which permitted their testimony to be read in the second trial. "The uncontradicted evidence is that the State used every available means to locate these witnesses without success." *Id.* at 1384.

With regard to the testimony of Alderman, the Court said that "even a reading of this witness' testimony in the cold record reflects its incredibility." *Id.* at 1387. As the Court went on to point out:

> In the first place, his was the last of the five cars to arrive at the scene. The Walker car was the lead car and pulled slightly off the highway on the righthand side. Officer Barentine's car was immediately behind the Walker car. It was Barentine who stopped the Walker car. Officer Vaughan's car arrived immediately and he pulled towards the center of the narrow highway. The next car to arrive was the cab which had passed Alderman's cab. It was only after this that Alderman's cab arrived, and it was parked angling towards the left side of the highway. It was somewhere near 2:00 o'clock in the morning, and dark. It seems impossible from a physical standpoint for Alderman to have seen anything that transpired in connection with the shooting after he arrived because the murder was committed at the front door of the lead car where Walker was seated, as Officer Vaughan approached the Walker car.

Id. at 1387.

In affirming Judge Henley, the Court of Appeals wrote: "Our canvass of the entire trial record as well as the record of the habeas corpus proceeding clearly convinces us beyond question that defendant was afforded a fair trial and

that none of his constitutional rights was denied." *Id.* at 1390.

For the time being, the habeas appeal ended Walker's legal efforts to obtain his freedom. After he began serving his sentence, he became a "born again Christian" and began to participate in church meetings all over Arkansas, admonishing the audiences against a life of crime. Walker was given numerous furloughs to participate in this type of activity. In 1975 he failed to return from such a furlough, went to California, changed his name, and disguised his appearance. Five years later an arrest on a drug charge revealed his true identity, and he was extradited from California to Arkansas after a highly publicized campaign in his behalf by west coast celebrities. An order from the Supreme Court of California temporarily blocked Walker's transfer to Arkansas. *In re Walker on Habeas Corpus*, Crim. No. 21422 (Cal. April 19, 1980). The Supreme Court of California directed the Superior Court of El Dorado County "to conduct hearings to determine 'if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United Staes Constitution' and thereafter to decide the petition on its merits." The Supreme Court of the United States reversed. *Pacileo v. Walker*, 449 U.S. 86, 101 S.Ct. 308, 66 L.Ed.2d 304 (1980) holding that Article IV § 2 and its implementing statute "do not give the courts of the 'asylum' or 'sending' state authority to inquire into the prison conditions of the 'demanding' state." *Id.*, 449 U.S. at 87, 101S.Ct. at 309.

After his return to Arkansas, Walker filed a habeas corpus claim and a claim under 42 U.S.C. § 1983. Under the latter statute Walker claimed that his life was in danger in the Arkansas penitentiary and requested that he be transferred to a federal penitentiary or a prison in another state. This court denied his request for transfer. Walker was, however, confined in the diagnostic center, where he did not have contact with the general prison population. In

August of 1983 the Court of Appeals ordered that Walker be transferred out of Arkansas, and he is now confined in the Federal facility at El Reno, Oklahoma. *Walker v. Lockhart*, 713 F.2d 1378, 1383 (8th Cir. 1983).

In his habeas petition Walker alleged the following grounds:

a. That the presiding trial judge at his murder conviction, Judge William Kirby, was biased against the plaintiff.

b. That there was official misconduct in the plaintiff's trials in state court in that the North Little Rock Police Department allegedly withheld exculpatory evidence and witnesses from the plaintiff.

c. That prejudicial pre-trial publicity made it impossible for the plaintiff to receive a fair trial before a fair and impartial jury.

d. That the plaintiff's principal attorney was intimidated, threatened and consistently interfered with by the trial court, police officers and other officials in a manner that prevented him from adequately defending the plaintiff.

e. That there is newly discovered evidence that exonerates the plaintiff.

f. That the sum total of the various alleged defects in the plaintiff's state trial were so serious as to shock the conscience of the court into violating his constitutional rights to a fair trial.

g. That in the prosecution of his prior habeas corpus petition, his rights to due process were abridged when representatives of then Governor Winthrop Rockefeller allegedly induced him not to apply for a

> writ of certiorari to the United States Supreme Court subsequent to the ruling of the Circuit Court of Appeals for the Eighth Circuit denying him habeas relief.

Walker v. Lockhart, 514 F.Supp. 1347, 1349-50 (E.D. Ark. 1981).

I found that grounds (a), (b), (c) and (f) had been thoroughly litigated before Judge Henley and that pursuant to 28 U.S.C. § 2244, these matters should not be relitigated. *Id.* at 1350-51. I agreed to hear evidence on points (d), (e) and (g). The Court of Appeals has succinctly summarized my rulings after I heard the habeas claim on its merits:

> The district court heard evidence on only two of the three grounds since the claim of newly discovered evidence was candidly abandoned at the outset of the hearing. [H. II, 173-74.] The district court considered Walker's due process claim and found it to be without merit. Although Walker's counsel decided to abandon this claim following presentation of the evidence, the district court found there was no credible evidence in the record to report it. [H. II, 365, 499.] Finally, the district court ruled that Walker's claim of ineffective assistance of counsel was unsustainable. At the habeas hearing Walker's former counsel who had assisted in representing him at trial clearly testified that he was not intimidated. [H. II, 369, 500.] The district court found that Walker had received an excellent defense by two experienced attorneys, that there was no intimidation by the trial judge or by the North Little Rock Police Department, and that Walker's defense had been praised in glowing terms by this court. [H. II, 499-500.]

Walker v. Lockhart, 726 F.2d 1238, 1249.

The majority opinion affirming the denial of habeas corpus summarized the evidence which it considered to be indicative of Walker's guilt as follows:

> First, Linda Ford, the passenger in the middle seat of the Oldsmobile driven by Kumpe testified that after she was pushed into the car Walker sat to her right with a gun on her. [R. II, 605.] When the car stopped at the scene, Ford saw Officer Vaughan approach the passenger side of the car and saw that Walker still had the pistol out. [R. II, 607-08.] When the door opened, Walker started firing. [R. II, 608.] She then heard several shots. [R. II, 608.] She knew that Walker had fired first because she could see the fire from Officer Vaughan's gun when he fired. [R. II, 609.] Second, Thomas Short, the cab driver who arrived on the scene almost contemporaneously with Officer Vaughan, saw Vaughan approach the passenger side of the Oldsmobile and bend over looking into the window to talk to someone. [R. II, 518; H. I, 2933-94.] After a few seconds, the car door suddenly opened. [R. II, 518.] Officer Vaughan jumped backwards, pulling his gun as he did so. [R. II, 518; H. I, 295.] While Vaughan was dancing backwards, Short heard a shot and saw Vaughan's feet fly out from under him. [R. II, 519.] Altogether, Short heard one shot and a pause and then four or five more shots fired in succession, "real rapid like." [H. I, 295.] After the shooting was over, Short walked around and saw one of the police officers kick a gun out of Walker's hand. [H. I, 298.] When Walker was turned over, Short saw another gun underneath him. [H. I, 299.]
>
> Finally, Captain Paul McDonald, a qualified ballistics expert, testified that the bullet removed from Officer Vaughan's body matched the four-inch barrel .38 caliber Smith & Wesson, [R. II, 767.], which was identified as the weapon found under Walker.

Id. at 1245-46.

The principal contention on appeal from this court's prior habeas ruling was that the issue of the bias of the trial judge should have been considered due to an intervening change in the law. The majority rejected Walker's argument that there had been a change of law with regard to bias of a trial judge. Walker also argued "that the ends of

justice would be served by reexamining the bias issue, based on the weakness, or insufficiency, of the evidence giving rise to his conviction." 726 F.2d at 1245. Although Walker did not raise the sufficiency of evidence argument in the 1967 or 1981 habeas petition, the majority nevertheless addressed this argument fully but concluded that "any rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307 at 319, 324, 99 S.Ct. 2781 at 2791, 61 L.Ed.2d 560. "Thus, the insufficiency of the evidence argument of Walker does not, under the ends of justice, justify reexamination of the issues raised again in the second habeas petition." 726 F.2d at 1248.

Subsequent to the affirmance of the habeas rejection and the denial of certiorari by the Supreme Court of the United States, *Walker v. Lockhart*, ____ U.S. ____, 104 S.Ct. 2168, 80 L.Ed.2d 552 (1984), the Court of Appeals granted a recall of mandate based on an entry in the diary of Russell Kumpe made available to defense through Kumpe's ex-wife, Peggy Davidson, after this case was decided by the Court of Appeals. The State countered the evidence of the diary entry with its own evidence of a taped confession made by Walker. *Walker v. Lockhart*, 726 F.2d at 1265 (8th Cir. 1984).

The Eighth Circuit gave the following instructions to this court:

> The case is remanded to the district court with instructions to take evidence from Russell Kumpe and his former wife, Peggy Davidson, relating to Kumpe's alleged firing of a gun at or near the time that Officer Vaughan was shot on the night of April 15-16, 1963. That evidence is to include the diary entry apparently dated Jaunary 16, 1968, relating to that incident.
>
> On remand, the State may offer as evidence the recorded confession of Walker allegedly made after his first trial. Walker may offer evidence to explain that alleged confession.

> The remand proceedings may be limited to the receipt of the evidence mentioned by both sides in their papers with respect to the recall of mandate, including the Kumpe statements and the recorded confession of petitioner and any explanation thereof and such additional evidence as the district court in its discretion may deem relevant to these proceedings.
>
> The district court should determine whether any of this evidence is credible enough to deserve the attention of a jury; whether the evidence would be admissible if a new jury trial were held; and whether the new evidence, when considered against the background of the existing record, sufficiently tips the balance of the "ends of justice" standard to require that a new trial be held. These findings should then be certified to this Court, sitting en banc, which can then consider, after briefing and oral argument, whether the new evidence, in the light of the district court's findings, requires a new trial.

Id. at 1265.

II. THE TESTIMONY

KUMPE'S ACCOUNT OF THE FATAL SHOOTING

The central figure in the hearing ordered by the Court of Appeals is Russell Kumpe. It was the entry by Kumpe in his diary that caused the Court of Appeals to recall the mandate. Kumpe testified at great length and without any apparent reservations.

Kumpe's narrative account of the events leading to the murder is as follows. After the altercation at the night club, he and Walker went to the Travelodge Motel. Walker cleared their belongings out of the room, and Kumpe paid the bill. Linda Ford appeared, and Walker, over the protest of Kumpe, insisted that she accompany them. (T. 100, 101). As they left the motel, Kumpe observed a cab following

them, and he thought he saw in the cab a woman with a distinctive hairdo such as that worn by Mary Louise Roberts (T. 103). Kumpe lost the cab in North Little Rock (T. 103). Walker and Kumpe discussed what to do in the event they were stopped by the police. Walker said he could not afford to be arrested because he was wanted in Nevada. Kumpe said he could not afford to run from a simple assault charge because he was not wanted. (T. 103.) At the stoplight where the England Highway (No. 130) intersects with Highway 70 and where they turned right on the arrow, they realized they were being followed when a police car ran the light and began to close in behind them (T. 103). Kumpe stopped in obedience to the police car signal. Officer Barentine ordered him out and ordered the others to remain in the car. (T. 105.) Kumpe was told to walk back with hands in front. Walker asked him before he left the car if he had that "piece." Kumpe replied, "No, it's under the seat." (T. 105.) Barentine told him to "spread eagle the police car," so he leaned down with both arms out but looked down toward the Oldsmobile (T. 105, 106.)

> And while I was looking down Walker cracked the door and when he did the dome light came on and I could see that he had a pistol in his hand. And about this same time Vaughan came up and he parked directly behind Barentine but slightly to the right so the two police cars were behind one another.
>
> And as he approached the car, Barentine was still—was still in the process of searching me. And Barentine told Officer Vaughan, he said, "I've got this one. Get the others out of the car."

(T. 106.) When Vaughan got even with the front fender of Barentine's car and Barentine told Vaughan, "I've got this one, you get the other two," Kumpe told Vaughan, "Let me get him out of the car. He's got a gun." Vaughan told Kumpe that he had a gun and he'd get the SOB. "And as he approached the car, the door—the door came open and Vaughan shot Jim and Jim returned the fire and shot and

killed Vaughan." (T. 107.) Vaughan fired two shots first, then Walker fired. He saw one more flash and then "took off." (T. 107.) "Barentine had backed up and unholstered his gun and when I swung off the car, I bumped him and he shot me." (T. 107, 108.) He shot me once in the wrist and once in the lower back side. "I ran around the police car. I got the police car between Barentine and myself and I stopped and looked back through and he was standing slightly to the left of his left front fender firing down toward Walker and the Oldsmobile." (T. 108.) "Walker shot back toward us . . . I saw flashes of the gun (T. 108)." Kumpe maintained that he was still on the police car when the shooting started (T. 108). "I was still in the process of being searched and was still spread eagled over the hood of the police car (T. 109)." Kumpe denied that he had a gun (T. 109). When they left the motel, they had three guns—one was on the front seat of the Oldsmobile, one was stuck in Kumpe's waistband, and Walker had a gun of his own (T. 109).

On redirect Kumpe stated that he brought two of the guns to Arkansas—both given to him by Jim Ing (T. 111). Kumpe testified that "on the night of the incident both of those guns were at one point in time in my possession and when we left the motel one of the guns was placed on the seat of the car and the other one was stuck in my waistband, and when I left the car, the gun that was in my waistband was placed under the driver's seat. Now which gun is which I don't know." (T. 112) He had a gun in a briefcase, which he took out and placed on the seat (T. 115).

Kumpe has not testified in any of the previous proceedings in this case. A review of his account of the events on the night Vaughan was killed closely parallels the version given by Officer Gene Barentine, Linda Ford, and the cab driver Thomas Short. Mary Roberts in her testimony in the state court proceeding said, "I don't know what happened, but just a lot of shooting started." She did testify that the shooting started immediately after she arrived in her cab. "Kumpe was standing back to where the policeman

was." (State Trial T. 534.) Paul Alderman, the driver of the cab in which Mary Louise Roberts was riding, gave a different account, but his testimony was discounted and rejected by both Judge Henley and the Court of Appeals, as noted *supra*. Alderman only testified in the hearing before Judge Henley. Kumpe disputed the testimony of Alderman and Roberts that they were present at the shooting (T. 80). When Kumpe ran from Barentine, he saw the Alderman cab arriving on the scene (T. 81).

THE DIARY ENTRY

Kumpe's unsworn, out-of-court statements present the problem in this case, and I have been directed to take testimony with regard thereto and the Court of Appeals specifically directed that the diary entry by Kumpe on January 16, 1960 be a principal subject of inquiry. The diary came to light when Peggy Davidson, Kumpe's ex-wife, came across some of Kumpe's belongings while cleaning out a closet on November 15, 1983 (T. 182). She turned it over to one of Walker's lawyers (T. 184). It is apparent that Ms. Davidson bears much animosity toward Kumpe. She admitted having shot him with a .22 rifle shortly before their divorce (T. 183). Kumpe claims she shot at him on another occasion (T. 621). During her marriage to Kumpe, she saw Walker on several occasions at church meetings and once when he came to a bakery where she worked accompanied by the prison chaplain (T. 186).

Kumpe addmitted keeping the diary or "notes" as he characterized the document. Kumpe related that the purpose of the diary was to record conditions at the penitentiary (T. 140). He thought he could make money from his notes (T. 140). He corresponded with Murton, the former prison superintendent who was writing "Brubaker," and he gave Murton some of his notes (T. 140). He had a close relationship with Murton and thought they were supposed to collaborate on the book. "I guess I would say he kind of stiffed me. He used a lot of my information and kept the money."

(T. 141) He did not deny making the entry in question, which reads as follows:

> Awakened at 1:30 a.m. by night sheriff, told only to go to Mr. O.'s office—Emergency. A great deal of agitating being done by James Dean Walker. I look at him and feel much remorse that I fired too high 4-16-63. He, according to rumor has vowed he will kill me at first opportunity. I do not underestimate his potential, but am not alarmed. I meet Walker this noon in the dining room. He does not speak nor do I. He is self styled or appointed spokesman for rank men.

(PX 1.)

Kumpe's explanation was that he was writing the diary while he was alone. He kept it in a desk drawer and wrote with his hand in the drawer (T. 40). He meant to write that he was sorry he (meaning Gene Barentine) fired too high (T. 41). He felt resentment at Walker over the incident because it resulted in his receiving a 21-year sentence (T. 41). Kumpe further explained his statement that Barentine fired too high as follows: "Well, Mr. Barentine was firing rather wildly and he certainly was shooting over Mr. Walker if Mr. Walker is down in the position where he was, and he's shooting through the Oldsmobile so certainly he's firing too high." (T. 54)

Before making the diary entry, Kumpe testified that he was awakened and told to go to the office of the farm manager and there asked to intecede with Walker who was "agitating a work stoppage." He talked to Walker "who told me goodbye." Both Kumpe and Walker were agitated. It was under these circumstances that he wrote the diary entry (T. 137).

THE CONVERSATION WITH KUMPE AT THE LUAU APARTMENTS

Ms. Peggy Davidson married Kumpe on August 5, 1968. They were divorced in July, 1975 after separation in

April, 1975. (T. 172.) She related a conversation with Kumpe while they were living at the Luau Apartments in Little Rock in the apartment of the manager (T. 173). An unnamed man was also present. Kumpe told the group that "he put his gun behind his pants and he got out and said he started to spread eagle on the car and he was pressing against the car so he wouldn't find the gun." (T. 175.) He also told them "that he (Barentine) was just going to start to search him when Vaughan's car came up, and he said Vaughan started around the car, and when he got to the door Kumpe said, 'He's got a piece,' and added, 'All hell broke loose.' Kumpe said he started to move and Barentine shot him, and he fell down under the car." She assumed it was the car they were in. "And he said in all the confusion and so many cops and so much gunfire and everything that he managed to crawl away and he said he buried a key, and that a car came through. It was an older model car. He thought it was a Nash. It had a funny exhaust. And he said he put the gun up in the exhaust and then the cops made the car move on out." (T. 176.) He did not say anything about firing a gun himself (T. 177-78). When the shooting broke out, Kumpe got down underneath the Oldsmobile and crawled away and got rid of the key and the gun (T. 178). After they returned to their own apartment, Ms. Davidson related the following colloquy with Kumpe:

> A We got downstairs, and I said, "Russell, you shouldn't tell that. The way you tell that," I said, "it sounds like you did it." And he kind of grinned and he said, "I did." I said, "Oh, you did not." And it just sort of went from there. I didn't believe it. You know, I said, "Oh, you did not."

(T. 178.) Kumpe told her on another occasion that he only made one mistake. "He didn't kill James Dean Walker, too." (T. 179.) On another occasion he told the story about the officer's missing the gun (T. 180).

Kumpe responded to his ex-wife's testimony about the Luau apartment conversation as follows. He married Peggy

Davidson in August, 1969 and divorced her in July, 1975. In the fall of 1969 he and his wife lived at the Luau Apartments, 17th and Center, Little Rock. He recalls talking about the Walker case on one occasion when his wife, the apartment manager and another man were present. (T. 28). He did not tell them that when he was searched by Barentine, he pressed against the fender so his gun would not be found (T. 30). He did not tell them that he hid the gun in the exhaust of a vehicle (T. 31) or that he buried a key to a safety deposit box in St. Louis (T. 31). However, he did have a key to a safety deposit box in an envelope which he covered with some leaves (T. 32). He does not recall his wife's saying to him, "The way you told it, it sounds as if you did it." (T. 34.) He emphatically denies responding to this statement, "I did." (T. 35.) He and his wife on several occasions went to hear Walker speak at various churches (T. 35). He denies telling his former wife that his "only mistake on the night in question, April 16, 1963, was not killing James Dean Walker, too." (T. 36.) Kumpe testified that he "did not ever tell her (his ex-wife) or anyone else that he shot Vaughan" (T. 80).

KUMPE'S ALLEGED CONVERSATION WITH BILLY EARL JOHNSON

Billy Earl Johnson, a witness for Walker, now lives in Memphis. He has been convicted of more than one crime in the last ten years (T. 198). He last received a three-year sentence for the theft by deception and has also been convicted on drug charges (T. 198). He worked with Kumpe at the prison from July to September, 1983. Kumpe told him that when the officer searched him, "The stupid M-F missed my pistol." He also said that "while the officer was in the process of frisking him, shooting broke out . . . . The M-F shot James Dean five times." (T. 207.) Kumpe "at that time hit the deck and Barentine shot him." (T. 207.) Kumpe told him he crawled off in a field and "said something about Officer Barentine shot him and then shot—started shooting at Walker and where Officer Vaughan was." Kumpe claimed

that Barentine panicked and just started shooting. (T. 209.) "And then at a later date he—I guess he had forgotten telling me about crawling in a field. He said he stashed the—had another car he pulled up somewhere nearby and he stashed the gun up under it somewhere." (T. 209.) Johnson claimed that on another occasion Kumpe told him that Barentine shot Vaughan and that he, Kumpe, made a deal to be tried for assault at the night club instead of accomplice to murder and that his sentence would be later reduced (T. 211).

On cross-examination Johnson admitted he had been in prison five times (T. 217). He is an admitted writ writer and prison litigator who admitted that he received information from Kumpe that Vaughan was killed by Barentine and did not relay this information to the prison authorities, prosecutor, or anyone else until he was contacted recently by Walker's lawyers (T. 221). His explanation was as follows: "I was hurt and injured while in the Arkansas Department of Corrections, filed various writs trying to get medical treatment, even, I think some to your court. I was not very enthused about going to the officials there . . . ." (T. 221.)

Kumpe categorically denied telling Johnson that Barentine had missed a gun tucked in his waistband (T. 50). Kumpe said that once Johnson asked him, "Did Walker kill Vaughan?" He replied, "Well, no, Johnson, he committed suicide." (T. 51.) He also denied telling Johnson that he crawled underneath a car and stashed a gun (T. 52).

KUMPE'S ALLEGED CONVERSATION WITH HIS SISTER AT THE ARKANSAS PENITENTIARY

Kumpe was visited at the prison by his now deceased sister, Mildred Eisner of Memphis, between July and November, 1963. After his conviction in July, 1963, she visited him several times (T. 67). Kumpe was shown a document purported to be a transcript of a conversation with his

sister. Kumpe would not admit to having made the statements contained therein. (T. 76.) He was asked about a statement, "You understand that I did shoot at that policeman." (T. 73.) Kumpe said that if he made such a statement, he lied "to pressure her into acting with a little more haste." (T. 74.) In answer to a question from the Court, Kumpe stated that he could not say that he had the conversation set forth in the transcript. He testified that from time to time, when his sister was visiting, he did discuss certain ietms related in the transcript. (T. 127.) Kumpe was asked by the Assistant Attorney General about a statement in the purported transcript of the conversation with his sister as follows: "The policeman committed suicide. He shot Walker first. See, if he doesn't shoot Walker then we don't have all the trouble and he is still alive. What would you do if someone shot you first?" (T. 96.) He was asked whether this seemed to show that he, Kumpe, was telling his sister that Walker shot Vaughan. Kumpe replied, "I suppose so." (T. 97.)

David White, Assistant Director for Public Relations of the Arkansas Prisons, testified that he had never run across evidence of inmate visits being surreptitiously recorded (T. 317). He has been with the prison system eight years (T. 308).

A great deal of testimony was directed toward the question of when this document came into the hands of Paul McDonald. McDonald is now the Chief Firearms Examiner for the State Crime Lab (T. 426). McDonald claims he came across it while looking for the Walker-Karam transcript and gave it to Prosecuting Attorney Bentley, who gave it to Assistant Attorney General Holder, who gave it to Walker's attorneys. McDonald has been with the State Police since 1947. He was with the Criminal Investigation Division (CID) from 1950-65. He headed CID from 1960-65. CID has a liaison man with the Cummins facility of the penitentiary at certain times. (T. 436.) At times no one did this work (T. 438). McDonald does not recall the CID's

receiving any documents from their liaison man at Cummins (T. 439). McDonald identified the transcript of the alleged conversation between Kumpe and his sister as a document in his possession. It was marked Plaintiff's Exhibit 2. Plaintiff's Exhibit 11 is the same except that a portion is highlighted (T. 442). It was highlighted by McDonald for the benefit of Prosecuting Attorney Bentley (T. 444). McDonald testified that Bentley had called him in February or March, 1984 and asked him to search his files for any information about the Walker case (T. 444). McDonald testified as a ballistics expert at both of the state trials of Walker and also at the habeas hearing before Judge Henley (T. 445). He did not have this document at the time of the three trials (T. 445).

While searching his files at the request of Bentley, "he found an envelope that he had received from W.A. Tudor and the document was inside the envelope" (T. 446). "We recently moved into our new headquarters building and in the process of moving we had a lot of files that I had boxed up. Now it was found in one of the boxes that I had boxed from a locked cabinet that I kept some files that I wanted to keep locked." (T. 448). The CID did not have a criminal investigation file on Walker. "We never did actually participate in the investigation of the James Dean Walker case at all other than the scientific evidence, the processing of some scientific evidence. So outside of those files, I knew of none that existed." (T. 448) McDonald testified that the document in question came to his attention sometime in the last ten years (T. 486). He did not have this document at the time of the trial or the habeas hearing before Judge Henley (T. 507). It was not in a file (T. 510). The only files he had on James Dean Walker were the ballistics files (T. 509). The document was in the envelope with the material he had received from W. A. Tudor (T. 510). (Tudor admitted sending some material but not this document (T. 465).) McDonald was not aware of a practice to record conversations of inmates with visitors (T. 511).

The transcript of a television interview with Paul McDonald was introduced as Plaintiff's Exhibit 12 (T. 12). In the transcript is the question or statement, "This thing that's been around since 1963, I guess when you were with the CID?" The answer by McDonald was "Yeah." McDonald answered in explanation that he was referring to the date on the transcript. (T. 478.) In the transcript appears a question by a television reporter: "Mathis—Well, here's what I want to know: Why—this is dated 1963—that's twenty-one years ago. Why is this just now being turned over to any attorneys—defense attorneys, prosecuting or anyone." (T. 478.) McDonald answered, "I don't know." (T. 478.) Then the reporter said, "But you knew about this in 1963." He answered, "In 1963 I did." (T. 479.) It is not clear to me whether this is an answer to a question by McDonald or a rhetorical question repeated to the questioner. McDonald said, "I either didn't understand the question, or I was trying to answer questions that I couldn't answer." (T. 477.)

KUMPE'S INTERVIEW WITH MIKE MASTERSON

Mike Masterson, a witness for the petitioner, is an investigative reporter for the *Arkansas Democrat* (T. 236). He interviewed Kumpe at the Cummins Prison on February 8, 1984. According to Masterson, Kumpe had a revolver in his waistband which Barentine missed in his search because he was "leaning hard against the front of the car to prevent the detection of that pistol. He said that at that point gunfire broke out, that Officer Barentine shot him, and that he denied going under the car." He told Masterson that he broke and ran into the bushes and cross the highway and in the process stuffed the gun in the exhaust system of a Nash Rambler being driven by an older couple. (T. 240.) Kumpe denied to him having fired a shot that night (T. 241). When he showed Kumpe copies of the diary, he threatened to sue him if he printed it (T. 243). He told Masterson that he intended to write "Barentine" in the sentence about "firing too high," but the light was bad and he made a mistake (T.

246). Kumpe denied telling Masterson that he had a gun in his waistband (T. 88). Kumpe testified that after he was spread eagled against the police car, Barentine did a thorough job of patting him down and searching him. "I will testify that if I'd had a gun in my waistband he could not have missed it at his searching." (T. 132.) Kumpe denied telling Masterson he was armed when he left the automobile (T. 44) or that he had disposed of the gun (T. 46).

KUMPE'S ALLEGED CONVERSATION WITH WARREN BROOKS

Warren Brooks, a witness for plaintiff, was formerly a guard at the prison in early 1968 (T. 264). He testified that Kumpe had told him that Walker was passed out and could not have fired a shot at the time Vaughan was killed (T. 265). Brooks knew Walker at the prison and liked him (T. 268). He questioned whether Walker was guilty (T. 268). Brooks did not report the conversation with Kumpe to any of the prison officials (T. 269) or the Prosecuting Attorney (T. 270). He first reported the conversation to Mr. Masterson (T. 270). He had gotten in touch with Masterson at the instance of Kumpe's ex-wife, Peggy Davidson, who was a good friend of his (T. 270). Kumpe denied making the above statment to Brooks (T. 26).

THE MELODY BEATTIE INTERVIEW

Melody Beattie, a witness for petitioner, is a writer from Stillwater, Minnesota. She became interested in the James Dean Walker case after being contacted by Oscar Fendler, one of Walker's lawyers. Her husband is director of a therapeutic community which is "a long-term residential treatment center for drug and alcohol addicts with a criminal background." (T. 279.) She claimed that A.L. Lockhart, the Arkansas prison superintendent, threatened her husband's life when he came down to transport two inmates who had gained executive clemency back to Minnesota (T. 274).

She met Kumpe at a cafeteria in Pine Bluff on June 5, 1982 (T. 276). "He told me that he had a gun on his person, I believe tucked in his belt after he got out of the car and after he was searched by Officer Barentine." (T. 278). He secreted the gun on the underside of a Nash automobile, and it left the scene with that automobile (T. 278). Ms. Beattie also testified that when Mr. Holder, the Assistant Attorney General, was in St. Paul arguing the Walker case on appeal, Mr. Holder said that he agreed with her husband's belief that Walker was innocent (T. 286). Holder denied making such a statement or "any statement which could have in any way led her to believe that that was what I intended to say" (T. 625). Kumpe denied making the admission about which Ms. Beattie testified (T. 90). He denied telling her that he had a gun when he got out of the automobile and that the gun was left under a Nash Rambler (T. 47).

THE GEORGE BENTLEY INTERVIEW

George Bentley, a reporter for the *Arkansas Gazette*, was called as a witness by plaintiff. His paper was contacted by Kumpe, who complained about the coverage the *Arkansas Democrat* was giving the Walker story. He volunteered to tell the true facts to a "capable journalist" (T. 287). Kumpe told Bentley that Vaughan fired the first shot (T. 293) and that he had fired three times (T. 293).

THE WILBUR C. BENTLEY INTERVIEW

Wilbur C. "Dub" Bentley, the Prosecuting Attorney for the 6th District including Pulaski County, was called by plaintiff. He testified concerning a tape recorded interview with Russell Kumpe, on March 2, 1984. The transcript of this interview was introduced as Plaintiff's Exhibit No. 9. Bentley had previously interviewed Kumpe at the Prison sometime before the tape recorded interview. Kumpe told essentially the same story at the Prison as told in the tape recorded interview (T. 330). The transcript of the tape

recorded interview closely parallels the story Kumpe related in his testimony during this trial. Although the transcript does not mention Walker's firing back in the direction of Barentine and Kumpe, Bentley testified that this was related by Kumpe in the prison interview (T. 335). When Bentley reopened his investigation of the Walker case, in February or March of 1984 he talked to Paul McDonald of the Arkansas State Police and learned that they had a document which purported to be an interview recorded at the prison between Russell Kumpe and his sister (T. 341). By April he would have been aware of this document (T. 342). About a month before the hearing, he gave a copy to Mr. Holder (T. 346).

WALKER'S STATEMENT AT THE PULASKI COUNTY JAIL

Paul McDonald, Arkansas State Police, testified that he was directed to go to the office of Col. Herman Lindsay, Superintendent of the State Police, in May, 1964. Lindsay had received a request from Governor Faubus for State Police assistance in making a tape at the request of Jimmy Karam. (T. 523-24.) He assigned Sgt. Koffman to go to the county jail and comply with the request. Upon his return Koffman turned the tape over to McDonald. (T. 526.) It has been in his possession ever since and, as far as he knows, no copies were made (T. 526).

Gene Koffman, a retired Sergeant with the Arkansas State Police, testified about taking and recording a statement of Walker at the Pulaski County jail (T. 539-54). He was present together with Karam and Walker (T. 541). Nothing of significance is missing from the tape (T. 546). The tape was received in evidence along with a transcript (T. 547). The damaging part of the transcript, as far as Walker is concerned, reads as follows:

> And I come to Little Rock, Arkansas, and again, I was drinking and that led to a fight up here in a nightclub.

> Now, it's led to murder. I killed a man out here, plus . . . it's probably late now to say that it wasn't done intentionally, but it wasn't. I know a lot of people don't see it that way, but, ah, I was here in this Little Rock Pulaski County Jail here, and even after I was here for about seven months, I still didn't . . . I thought that the only wayout of it was through the people that I knew before, you know, through some kind of graft or sin. Something I could make me get out of it . . . . One day we were having a prayer, and I asked the Lord to forgive me if he could for my sins that I had committed because I had committed I can say, ah, every sin imaginable . . . stealing up to adultery, fornication . . . murder, even.
>
> . . .
>
> KARAM: And, too, I think last Sunday you said to me that, ah, you knew Jesus had forgiven you now and you hoped that this young officer's family and people could forgive you.
>
> WALKER: Yes, I know it's hard on you to take a life. For this woman felt . . . for this caused a lot of butterness in her heart, and I can understand that. Her husband's dead and that in some way, I don't know how, I would like to tell her that . . . I know "I'm sorry" doesn't say very much, but . . . that's how . . . it's a terrible thing to have happen.

(DX B, 3-5.)

Jimmy Karam testified that he is in the clothing business (T. 555). Prior to May, 1964, he became acquainted with Walker when he (Walker) was baptized (T. 555). He secured the tape to be used by Billy Graham (T. 557). A man named Alton Carter was present when the tape was made (T. 558). No one with the Arkansas State Police was present (T. 559). He feels like he sent Dr. Graham a copy of the tape, but doesn't know if he used it (T. 560). He doesn't know where the original tape is located (T. 568). Karam's voice is

on the tape (T. 569). Karam stated that the tape appears to be an accurate representation of the conversation he had with Walker (T. 569) "excepting that I undoubtedly gave him something because he said he read part of it."

WALKER'S CONVERSATION WITH RAY CARNAHAN

Ray Carnahan is with the Arkansas State Police (T. 151). On August 27, 1973 he was instructed to pick up Walker and bring him to a speaking engagement at a church in Little Rock. During the trip from the penitentiary, Walker told him that "he had gotten into the wrong crowd as a young man and that one thing led to another and the night that the officer was killed that he didn't want to go to jail and he shot the officer." (T. 152)

JAMES DEAN WALKER'S EXPLANATIONS OF HIS ADMISSIONS

With reference to the statement given to Jimmy Karam, Walker stated that Alton Carter, one of the men who had visited the jail after his conversion, "asked me if I would be willing to share what had happened with me so that other people, young people might not face the same circumstances." Later on a Sunday Carter brought Jimmy Karam for a visit. (T. 647.) Several days later Mr. Karam and Carter took his tape recorded statement (T. 648). No police officer was present (T. 648).

Walker explained the statements in the Karam transcript as follows:

> Q. Would you turn to Page 4, the second line towards the end, if you would just read that sentence.
>
> A. "Now, it's led to murder." By this I meant exactly what we were talking about earlier at the opening of

this thing, I am here to accept this verdict that the jury has given, that is, a guilty of first degree murder verdict.

Q. Now, if you would go back and read the line before "Now, it's led to murder", and then—including also the line "Now it's led to murder". "And I", it begins on the previous page.

A. "And I come to Little Rock, Arkansas, and again, I was drinking and that led to a fight up here in a nightclub. Now, it's led to murder".

Q. And then what is the next line after that?

A. "I killed a man out here, plus . . . it's probably late now to say that it wasn't done intentionally, but it wasn't. I know a lot of people don't see it that way, but, ah, I was here in this Little Rock Pulaski County Jail here, and even after I was here for about seven months, I still didn't . . . ", in other words, what I was saying I still didn't know, I was still confused about the events that happened. This is why I say, "some people didn't see it that way".

Q. And what did you mean by this, I killed a man . . . it wasn't intentional, but maybe a lot of people don't see it that way.

A. My actions led up to a man being killed, is what I was saying. And when I say it wasn't done intentionally, I knew that at that point even if somehow I had have done it, it would have to have been accidental, because I, I did not get out of the car with any intention of shooting anyone.

Q. Now, if you move down the page, slightly below the middle there's a sentence that begins on the left-hand page, "I had committed"—

A. " . . . I can say, ah, every sin imaginable . . . stealing up to adultery, fornication", there's a pause, "murder,

> even". Here again we're referring to the present murder verdict.
>
> And this is all—this—I will say this, Mr. Halvonik, I think Mr. Karam knows this very well also, that this was never meant to be any kind of a confession to murder.
>
> Q. Or to shooting Officer Vaughan?
>
> A. Or to shooting Officer Vaughan.
>
> This was simply meant to be a testimony to my wrong path in life and the moral responsibility that I had and all of these events that led up to this.
>
> I think one thing if you will notice in this statement there is never any place where I do accept the jury's verdict at that time, I did accept my responsibility for a man being killed and my actions that led up to this. There is never anywhere in this transcript, or on that tape that was played today, any words that said "I shot and murdered Jerrell Vaughan."

(T. 655-57.)

With reference to his statement about the widow, Walker stated:

> And I'm talking about her sense of grief that she obviously felt from what I saw when she was in the courtroom.
>
> And to this day even, I would, I would certainly hope that Mrs. Vaughan and the other members of her family would somehow be able to forgive me for my responsibility in all that happened that night.

(T. 659.)

Walker gave the following testimony in answer to questions by the Court:

Mr. Walker, let me ask you one thing: You said, you have mentioned it several times and you considered a rather strong possibility that the firing of your gun might have been a reflex action after you were shot?

THE WITNESS: Yes, sir, that is correct.

THE COURT: All right. And that would indicate that you did get out of the car with a gun in your hands?

THE WITNESS: That is correct, I did.

THE COURT: You do recall—

THE WITNESS: Yes, sir.

THE COURT: —that you got out of the car—

THE WITNESS: I recall exactly what happened up to the point where I got shot.

THE COURT: Well, you do recall getting out of the car with the gun in your hand. Do you think that maybe as a result of getting shot that by reflex action, it's possible that you could have shot Officer Vaughan?

THE WITNESS: I have thought that that could have been possible, your Honor.

(T. 665-66.)

THE TESTIMONY OF ROBERT MOORE

The plaintiff during the trial produced a surprise witness, Robert Moore, who claimed to have been in the Short cab and to have been a witness to the shooting of Vaughan. Moore claimed to have been at the club when Walker and Kumpe were involved in the altercation with an Airman resulting in the shooting of the latter. (T. 354.) He claimed to have jumped into the Short cab, which was sit-

ting in front of the club, immediately after the altercation and told the driver to take him to his home in North Little Rock (T. 382-383.) While the cab was crossing the Broadway bridge, the dispatcher told them to follow another cab. "Well, we pulled up and there was two squad cars. One was in front of the car and one was in back, and ther was another cab there and we pulled up beside the cab." (T. 355.) In the fist cab were two women—one girl was Mary Roberts and he didn't know the name of the other girl. Vaughan's car was in front of the Oldsmobile and was headed back in the direction of town. (T. 391.) After they pulled up, Moore described the events as follows:

> It looked just like a very simple arrest, and I just opened the back door and was standing, you know, just standing there looking, and they had their lights on and spotlights on.
>
> And they had Mr. Kumpe, Mr. Barentine had him and he was searching him at the car. And Mr. Vaughan told Mr. Walker to get out of the car, and Mr. Walker told Mr. Vaughan, "I have a gun"—
>
> . . .
>
> —and he throwed the gun out on the ground.
>
> . . .
>
> He told him, he said, "I'm coming out" and he come out in a sitting position, you know, just like I'm sitting here, and he come out on the ground like this (Indicating), and about that time bullets just started flying.

(T. 357-58.) In answer to the question of who fired first, Moore stated, "The best I can remember the firing started over where Mr. Barentine was at." (T. 358.) Moore also testified that "when the other officers arrived, Mr. Barentine was standing there at the hood of his car and he kept saying, "I didn't mean to, I didn't mean to.' And the other officers told him to shut up." (T. 360.) He claimed to have

spoken to someone at the prosecutor's office (T. 360). He claimed that when Walker was fighting extradition, he was called to Governor Clinton's office and talked to two men on a Sunday—one was black and one white. As to why he was called, "They said that they were taking people's testimony that they hadn't talked to, and they asked me what I knew about it and I told them just exactly what I've told you all here today. And the last thing they told me was do not talk to no newspaper and do not talk to nobody." (T. 363.) On cross-examination Moore denied he had ever had mental or drinking problems (T. 367). He said that Vaughan's car was in front of the Oldsmobile and Barentine's car was in back of the Oldsmobile (T. 369). He did not contact Walker's attorney because if he had "I'd been a dead man today." (T. 379.) He did not come forward at the time of the Walker trials because "I was told by several people the best thing for me to do was to keep my mouth shut" (T. 302). He was in the VA hospital for three years (T. 398).

At the close of Moore's testimony, I informed the State that since he had only come forward the night before with his testimony, I was going to give the State several days to check into his background. In addition, his story was completely at variance with that of every other witness who had testified in this matter. After listening to him testify, I was convinced that his story was a complete fabrication. In the first place, Short, the cab driver who is now decesed, testified at the first trial (1st trial TR, 88) and in the habeas hearing (habeas TR, 282) that there were no passengers in his cab. Short was not at the club when the altercation occurred and where Moore claims he was picked up by Short. Short was at East Broadway and Vine in North Little Rock when the dispatcher ordered him to follow the Oldsmobile which was then at Third and Buckeye Streets in North Little Rock (2d trial TR, 462). Moore's story is incredible in another respect. He claimed that immediately after the altercation the Short cab drove from the club on South Main to the Broadway Bridge where Short received instructions to follow the Oldsmobile. This is a trip of less than five

minutes' duration. It is undisputed that after the altercation Walker and Kumpe went to the Travelodge Motel on Capitol Avenue in Little Rock, called Linda Ford and asked her to meet them, and then packed their belongings and checked out of the motel. They could not have been in the vicinity of a vehicle which had gone directly from the club to the Broadway Bridge. Moore's testimony that the Alderman cab arrived at the scene before the Short cab and had two females passengers is contrary to all the testimony in the case. The reason why the Short cab was directed to take up pursuit of the Oldsmobile was that the Alderman cab could not keep up. The testimony that the Vaughan car had passed the other vehicles, turned around and was in front of the Oldsmibile headed in the opposite direction is incredible, and is contrary to all other testimony in the case. Moore's testimony concerning the shooting conflicts with all other witnesses including Walker.

My conclusion that Moore's story was a complete fabrication was further confirmed when he was recalled by the State. Moore was a convicted burglar who was in the Arkansas prison system at the same time as Walker (T. 740, 750). He has been arrested innumerable times by the North Little Rock Police Department and was arrested on July 14, 1976 for terroristic threatening directed toward a member of the North Little Rock Police force (T. 769). Unquestionably, he has considerable animosity toward all police and especially the North Little Rock Police. He was caught in numerous contradictions on the stand about his police record. He denied having mental or drinking problems. (T. 367.) By agreement of counsel, I examined the records at the Veterans Administration *in camera*. One of his principal health problems has been severe and chronic alcoholism with all its associated physical and mental problems.

In regard to Moore's testimony about telling his story to two of Governor Clinton's assistants, James Smedley and Robert Lyford, the two extradition officers at the Governor's office, recalled meeting with an intoxicated man

at the State Capitol (T. 728). This man discussed conditions at the prison and whether the Governor should retain an individual in the prison administration. Smedley did not recall any mention of James Dean Walker. (T. 724.) Neither did Lyford (T. 731). Lyford testified, "I remember that he appeared to be drunk while he gave us his story, but . . . it just sticks out in my mind that it was a very rambling, nearly incoherent presentation." (T. 732.) Lyford said the meeting "did have something to do with corrections" (T. 731).

Gene Barentine was called for the purpose of rebutting Moore's testimony. His testimony substantially followed that given in the earlier trials of this matter although, because of the passage of time, he was hazy on some details (T. 573-616). It is not necessary to dwell on his testimony in view of my conclusion that Moore's story was completely fabricated.

III. FINDINGS OF FACT

1. Kumpe's sworn testimony closely parallels the accounts given by the other eyewitnesses who testified in the two state court trials. There is no reason to feel that a jury would disbelieve this testimony since in all its essentials it is corroborated by the other eyewitnesses. Significantly, his testimony that he removed a gun from his waistband and placed the same under the front seat of the car is confirmed by the physical evidence at the scene. "A third gun (4-inch barrel .38 colt revolver) was found on the front floor board under the driver's (Kumpe's) seat." *Walker v. State, supra*, 388 S.W.2d at 14.

2. Kumpe denied under oath that he had fired a gun on the night in question. While there was much testimony about Kumpe's telling Walker witnesses that he had an undetected gun in his waistband, there is little or no credible testimony that Kumpe fired a gun on the night in question. His story as related by Billy Johnson, the Cummins inmate, was that the shooting broke out while Barentine was

frisking him. At no time did Kumpe tell Johnson that he had shot Vaughan or even fired a gun. Kumpe specifically denied to Mike Masterson, the *Democrat* reporter, that he had fired a shot. There was no testimony from Melody Beattie, George Bentley, Wilbur Bentley, or Warren Brooks that Kumpe ever admitted to firing a shot on the night in question. Kumpe's wife came closest to such testimony, but her testimony deserves a great deal of skepticism. She obviously has much animosity toward Kumpe. She admitted shooting Kumpe on one occasion, and Kumpe claimed she tried to kill him on another occasion. Her animosity toward Kumpe is mixed with sympathy and admiration for Walker. But even her account of Kumpe's story contains the following question and answer.

> Q. Now, did he say up there in the apartment anything about firing a gun himself?
>
> A. No, sir.

(T. 177-78.) In fact, her account of the story that Kumpe told in the Luau apartment, except for the part about secreting the gun, varies very little from the account he gave on the stand. She claimed to have chided Kumpe about telling the story in such a way that it sounded like he "did it." If she repeated his account correctly in her testimony, Kumpe made no such admission at all in the story he told in the manager's apartment. The other two parties present in the Luau apartment were not called as witnesses.

3. The most favorable testimony developed on Walker's behalf is the diary entry. Kumpe readily admitted making the entry. His explanation is that he was writing the diary under difficult physical circumstances and that he wrote "I" when he meant to write "he." This explanation, although somewhat dubious, is supported by one undeniable circumstance. The diary entry on that date, when read as a whole, is a denunciation of Walker and an expression of some fear that Walker might do him harm. The entry was

written as a result of Kumpe's being asked to go speak to Walker about some trouble he was inciting among the inmates. After being rebuffed by Walker, Kumpe came back in a bitter frame of mind and wrote the entry. Specifically, what I was referring to was that I felt very bad or I felt much remorse that Barentine didn't kill Walker when he was firing at him." (T. 41.) A fair interpretation of the whole passage is that Kumpe regrets that Walker is still around—that he didn't get killed out on the Little Rock-England road, either by him or by Barentine. If Kumpe wrote this entry exactly as intended and if it reflects the truth, this is the only admissible evidence where Kumpe said he fired a shot on the night in question. Not a single eyewitness has testified that Kumpe fired a shot. In fact, the overwhelming proof is that Kumpe was being searched when the shoot-out between Walker and Vaughan ensued.

4. Even though I do not believe that the alleged transcript of Kumpe's conversation with his deceased sister is admissible, as will be discussed *infra*, it is noteworthy that on the whole the transcript is not helpful to Walker. While Kumpe allegedly said that he shot at "the policeman," it is not clear which policeman he was talking about—Barentine or Vaughan. Later in the transcript Kumpe makes statements that strongly suggest Vaughan died as a result of the shoot-out with Walker.

5. A number of witnesses related conversations with Kumpe in which he claimed that he had a pistol secreted in his waistband, which was missed by Barentine in his search. Peggy Davidson, Billy Earl Johnson, Mike Masterson, and Meoldy Beattie all testified to this effect. Kumpe categorically denied making such a statement. He testified that he put the gun under the seat because he was a convicted felon and could not afford to have a firearm on his person. There are three possibilities: (1) Kumpe had the pistol in his waistband; (2) Kumpe made up the story of having a pistol in his waistband to impress his hearers that he "had put one over on the police"; or (3) Kumpe was telling

the truth about not having a pistol. In my opinion, the second alternative is a real possibility. Kumpe has been in and out of prison most of his adult life and is in prison now. It is understandable that one with his background would enjoy bragging about foiling the police. But even if Kumpe did have the pistol and Barentine missed it, this does not establish that Kumpe used it or that he used it to shoot Vaughan.

6. The testimony by Robert Moore is incredible, and I am convinced that it was completely fabricated. Moore, a prison inmate with Walker and a chronic alcoholic who had been arrested on numerous occasions by the North Little Rock Police, told a story that conflicted in every deatil with all the other witnesses to this incident. He claimed to have been a passenger in the Short cab. Short, now deceased, testified under oath at Walker's trial that he did not have a passenger in his cab. Short, a disinterested witness, had no reason to lie. Moore's demeanor on the stand and the testimony which he gave, as well as my *in camera* examination of his medical records at the Veterans Administration hospital, persuade me beyond peradventure that Moore was not present at the time Vaughan was killed.

7. A man named Charles Holloway gave an affidavit which was filed with the Court of Appeals as an apendage to the Petition for a Recall of the Mandate. Holloway did not appear at the trial. I gave Walker's counsel an opportunity to present his testimony by deposition. His testimony was not forthcoming either in person or by deposition. Barentine testified that he did not know a Charles Holloway (T. 573). He never told Holloway or anyone else that he thought he had killed Vaughan (T. 574). I can only conclude that Holloway's affidavit, like Moore's story, was fabricated.

8. In May, 1964 Walker had a conversation with Jimmy Karam, a Little Rock clothier. This conversation was at the Pulaski County jail after Walker had been sentenced to death in the first trial and after he had undergone a

religious conversion. Karam testified that he wanted the tape for possible use by the evangelist Billy Graham. Walker had no reason to falsify his statement on this occasion. He and Karam both admitted that the statement is a fair representation of what was said. Parts of it are set out, *supra*. It is a clear and unequivocal admission by Walker that he killed Vaughan. He made a similar admission to State Trooper Ray Carnahan.

9. In addition to the above admission out of Walker's own mouth that he killed Vaughan, there is the following testimony from Walker in answer to some questions which the Court put to him:

> Mr. Walker, let me ask you one thing: You said, you have mentioned it several times and you considered a rather strong possibility that the firing of your gun might have been a reflex action after you were shot?
>
> THE WITNESS: Yes, sir, that is correct.
>
> THE COURT: All right. And that would indicate that you did get out of the car with a gun in your hands?
>
> THE WITNESS: That is correct, I did.
>
> THE COURT: You do recall—
>
> THE WITNESS: Yes, sir.
>
> THE COURT: —that you got out of the car—
>
> THE WITNESS: I recall exactly what happened up to the point where I got shot.
>
> THE COURT: Well, you do recall getting out of the car with the gun in your hand. Do you think that maybe as a result of getting shot that by reflex action, it's possible that you could have shot Officer Vaughan?
>
> THE WITNESS: I have thought that that could have been possible, your Honor.

(T. 665-66). After an overnight recess in the hearing, Walker attempted to dilute the significance of this testimony by explaining that in the past he thought that he could have fired a shot at Vaughan. Based on his demeanor on the stand, both on the day he gave the above testimony and on the next day when he attempted to explain this testimony, his explanation did not ring true. If Walker got out of the car with a gun in his hand, it is logical that Vaughan would open fire. It is also logical that Walker would return the fire either deliberately or by reflex action after Vaughan shot him. In either event, it is apparent to the Court that Walker fired the fatal bullet.

CONCLUSIONS OF LAW

1. The Court of Appeals has directed that this Court should determine whether any of the evidence is credible enough to deserve the attention of a jury. In my opinion, the evidence which would be deserving of a new trial would be some evidence that Kumpe shot Vaughan. I find no such credible evidence in this record. I further find no credible evidence in this record that Kumpe shot *at* Vaughan. I find very little evidence worthy of belief that Kumpe fired any shot on the night in question. Kumpe has denied under oath that he did so. The only evidence to the contrary appears in a very strange and ambiguous statement in a diary being kept by Kumpe, which has been discussed in detail, *supra*. None of those present on the scene of the crime have testified that Kumpe fired a shot.

2. The Court of Appeals has asked the Court to determine whether the newly discovered evidence would be admissible if a new jury trial would be held. The diary entry would be admissible. Kumpe has identified the diary and acknowledged writing the entry, and he has been given an opportunity to explain it. He has denied firing a shot on the night in question. It would be admissible under Rule 613 of the Arkansas Rules of Evidence, which is identical to Rule 613 of the Federal Rules of Evidence. However, the diary

would not be substantive evidence under Arkansas Rule 801(d)(1), but could be used only for impeachment purposes. It was formerly the rule that inconsistent statements were admissible only for impeachment and not as substantive evidence. *Comer v. State*, 222 Ark. 156, 257 S.W.2d 564 (1953). That limitation has now been abolished entirely in civil cases and has been similarly abolished in criminal cases when the prior statement was given under oath and subject to the penalty of perjury. Uniform Evidence Rule 801(d)(1). Here the prior statements of Kumpe were not under oath and could only be used for impeachment in a criminal trial in Arkansas. He would have to be called and the same procedure used in the Arkansas criminal trial as was used in the hearing before me. As Judge Arnold pointed out in the concurring opinion recalling the mandate:

> Even if we assume that the hearsay could not come in as substantive evidence, however, it would probably still get before the jury in some form for purposes of impeachment. Kumpe could be called as a witness and asked whether or not he shot Vaughan. If his answer is no, he could then be asked whether he had made the alleged statements to his former wife, and whether he had made the claimed diary entry. If he admits the diary entry and the statements to his former wife, the fact of these prior inconsistent statements would then be before the jury, together with whatever explanation Kumpe might wish to offer. If, on the other hand, he denies making the alleged prior inconsistent statements, extrinsic evidence of these statements, including the diary itself and the testimony of Kumpe's former wife, could be offered for impeachments purposes. See Jones, Case Note, Roberts v. State: *A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements*, 37 Ark.L.Rev. 688 (1984). In either event, the jury would know about the diary entry and the alleged oral admissions.

Walker v. Lockhart, *supra* at 1266.

Kumpe has admitted the diary entry but has given an exculpatory explanation. He has denied making the admission about which his ex-wife testified. But the diary and his ex-wife's testimony could be put before the jury for impeachment purposes only.

3. I do not see how, under any circumstances, the transcript of the alleged conversation between Kumpe and his deceased sister could be admitted into evidence. It is not authenticated. McDonald testified that it was sent to the State Police by parties unknown sometime in the last ten years. He does not know who took it or how it was taken. Even if someone were to identify the document and testify when and where it was taken, it would still be hearsay. I know of no recognized exception to the hearsay rule which would apply. The exception more nearly encompassed is Uniform Rule 803(16) which reads as follows: "Statements in a document in existence twenty [20] years or more the authenticity of which is established." This document is dated November 12, 1963, which is more than 20 years ago. However, no one has attested to its authenticity.

Petitioner argues that authentication is satisfied under Rule 901(b)(8), which provides in pertinent parts that a document is authenticated if there is:

> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Subpart (C) above is satisfied, but the Court finds that subparts (A) and (B) prevent utilization of Rule 901(b)(8) to gain admission of this document. The manner in which this document was found creates a great deal of suspicion as to its authenticty. While this does not directly deal with the document's physical condition, it is a factor which cannot be overlooked. Furthermore, the record is lacking of any

evidence which would explain where this document "would likely be" if it were in fact authentic. It is therfore impossible to state that it was found "in a place where it, if authentic, would likely be . . . ."

4. Walker argues that his right to due process was violated by the suppression of exculpatory material. In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant's fundamental right to a fair trial was further ensured when the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process." *Id.*, 373 U.S. at 87, 83 S.Ct. at 1196-97. Suppression is nondisclosure, *Lindhorst v. U.S.*, 658 F.2d 598, 605 n. 8 (8th Cir. 1981), and it matters not whether the prosecutor acted in good faith rather than in bad faith. *Brady v. Maryland, supra*, 373 U.S. at 87, 83 S.Ct. at 1196. In *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) the Supreme Court explained that:

> The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

408 U.S. at 794-95, 92 S.Ct. at 2568. The teachings of *Moore v. Illinois, supra*, have been adhered to in this Circuit. *Evans v. Janing*, 489 F.2d 470, 474-78 (8th Cir. 1973).

In *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) the Supreme Court held that the Brady rule would also apply even where there had been no request by the defendant for exculpatory information. In reaching this holding the Supreme Court acknowledged three different situations wherein the Brady rule would apply. Where the prosecution's case included perjured testimony and the pro-

secutor knew or should have known of the perjury, a conviction must be set aside if there is any reasonable likelihood that the perjured testimony could have affected the judgment of the jury. *Id.*, 427 U.S. at 103, 96 S.Ct. at 2397. If a specific request was made by the defendant for the suppressed exculatory material, a conviction must be set aside if the suppressed evidence might have affected the outcome of the trial. *Id.* at 104, 96 S.Ct. at 2397. Where either a general request or no request has been made for exculpatory material, the suppressed evidence must be evaluated in the context of the entire record and the conviction will be set aside if "the omitted evidence creates a reasonable doubt that did not otherwise exist. . . . " *Id.* at 112, 96 S.Ct. at 2402. *See also U.S. v. Peltier*, 731 F.2d 550, 553 (8th Cir. 1984). It was the varying standard of materiality to be applied that determined which approach governed a particular case. The approach to be followed in this case will be discussed, *infra*.

The first issue that must be addressed by this court in its *Brady* analysis concerns whether or not there has been a suppression by the prosecution in this case. Again, the focus is on the nature of the evidence and not the motives of the prosecutor. In this case, there is no reason to believe that the prosecutor had any knowledge of the purported transcript of a conversation between Kumpe and his sister. Furthermore, there is no evidence that either the North Little Rock police or the Pulaski County Sheriff's Office knew of its existence. The Court has previously discussed the significant questions which exist as to who recorded, transcribed and prossessed this alleged statement. giving the petitioner the benefit of all inferences under his *Brady* claim, the Court will assume that the statement was in the possession of Paul McDonald at the time of petitioner's conviction.

There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v.*

Illinois, supra, 408 U.S. at 795, 92 S.Ct. at 2568. However, the treatment of the police as an arm of the prosecution for *Brady* purposes is now generally accepted. *Walker v. Bishop, supra*. "The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if . . . [a defendant] is the victim of police suppression of the material information, the state's failure is not on that account excused." *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964). The fact that there are potential limits to the zone of police knowledge to be imputed to a prosecutor has been recognized, *Johnson v. Bennett*, 386 F.2d 677 (8th Cir. 1967); *Hauptmann v. Wilentz*, 570 F.Supp. 351, note 42, at 389 (D.N.J. 1983), and certainly, the knowledge of all police is not imputed to a prosecutor for *Brady* purposes. Here the petitioner would have this court find that the prosecution suppressed the Kumpe-Eisner transcript by virtue of the fact that the person conducting the ballistics examination was aware of the statement's existence and failed to report the same to the defense. Although McDonald denied under oath that he knew about this statement, the Court has assumed he was aware of its existence. If he had been aware of it, it would not be surprising to find that he failed to recognize that it had some significance for petitioner's defense. The statement did not deal directly with petitioner's use of a gun at the crime scene, and this was McDonald's major assignment of inquiry from the prosecutor. It was not the function of the State Police to actively engage in the generalized investigation of such crimes. Although the temptation of hindsight may be to say that "any officer" would recognize the significance of such a statement, the Court is not so easily persuaded. Given the limited investigative assignment of McDonald, it would seem unreasonable to charge the prosecution with having suppressed material, the significance of which was lost upon someone removed from the general investigation of the crime. However, as with possession of the statement, the Court will assume that the prosecution had a duty to report the Kumpe-Eisner statement to the defense.

Since the petitioner's burden of demonstrating materiality is related to the nature of his request for *Brady* material, the Court will now turn to the determination of whether petitioner made a general or specific request for such material.

> [A] request for disclosure of particular information cannot be labeled as either 'specific' or 'general' in a vacuum. Rather, the question must be asked whether, under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense required. In other words, 'specifity' is a function of several factors, including the literal language of the defense request itself, the apparent exculpatory character of the evidence sought, and the reasonableness of the explanation, if any, for which the evidence was not exposed or was not considered to be material by the prosecution.

Scarr v. Niccum, 620 F.2d 186, 190 (8th Cir. 1980).

The record in this case, and the petitioner does not argue otherwise, reflects only general requests for exculpatory material from the prosecutor's files. *See, e.g., Thompson v. State of Missouri*, 724 F.2d 1314, 1318 (8th Cir. 1984). The Court therefore finds that petitioner's requests for *Brady* type material were general. Where a general request for *Brady* exculpatory material is involved, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *U.S. v. Peltier*, 553 F.Supp. 890 (D.N.D. 1982), *remanded for other reasons, U.S. v. Peltier*, 731 F.2d 550 (8th Cir. 1984). Even if there had been a specific request, this Circuit has consistently held that where the suppressed evidence could only be used for impeachment purposes (which, assuming admissibility, is the only use to which the Kumpe-Eisner statement could be put), less materiality attaches to the evidence. *U.S. v. Librach*, 520 F.2d 550, 554 n. 3 (8th Cir. 1975); *Link v. U.S.*, 352 F.2d 207, 212 (8th Cir.

1965); *Lindhorst v. U.S.*, 658 F.2d 598, 606 (8th Cir. 1981). Therefore, even if a specific request had been made, the burden would have been upon petitioner to have demonstrated that, in the context of the entire record the omitted evidence created a reasonable doubt that did not otherwise exist. In determining whether or not petitioner has carried his burden in this regard, the Court also observes that the Kumpe-Eisner statement was surreptitiously acquired and not under oath. The only sworn statement given by Kumpe disavows any participation in the actual shooting of Officer Vaughan. This sort of consideration was taken into account by the Eighth Circuit in *Thompson v. State of Missouri*, *supra* at 1318-19 wherein it was noted that the party whose statement was suppressed had previously incriminated the defendant making the *Brady* argument. Similarly, Kumpe has made sworn incriminating statements against the petitioner and made unsworn incriminating statements in the same document advanced by petitioner as *Brady* material.

The Court has exhaustively reviewed the entire record in this case. (See Court's discussion, *supra*, as well as the two State Supreme Court opinions and *Walker v. Bishop*, *supra* at 770-72; *Walker v. Bishop*, *supra* 1380-81; *Walker v. Lockhart*, *supra* at 1245-46.) In the context of the entire record, the Court concludes that the Kumpe-Eisner statement does not create a reasonable doubt concerning the guilt of petitioner in the shooting death of Officer Vaughan. Even where a review is limited to the record of Walker's second trial, the Court concludes that there is no reasonable doubt concerning his guilt created by this statement.

There is an additional reason this court would not be inclined to grant the writ based on the alleged suppression of the Kumpe-Eisner statement:

> Evidence is not "suppressed" if the defendant either knew or should have known of the essential facts per-

> mitting him to take advantage of any exculpatory evidence. As a result the Government is not required to disclose [material] to a defendant who is "on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish." (Citations omitted.)
>
> *U.S. v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975).

This approach has been specifically approved by this Circuit. *U.S. v. Akin*, 464 F.2d 7, 8 (8th Cir. 1972). In this case petitioner was in a position to recognize that Kumpe was a witness to the shooting incident. It is unclear whether Kumpe was interviewed by petitioner's trial attorneys. If they had, there is no reason to believe that Kumpe would have told a story any different from the one he told this court under oath. His testimony under oath incriminated petitioner and even armed with the Kumpe-Eisner statement, it is entirely possible that petitioner's attorneys would have declined to call Kumpe as a witness.

5. Petitioner continues to direct attention to the fact that he had a loaded gun in his hand immediately after the shooting accident. It must be remembered that he also had, either underneath him or right beside him a second gun that had been fired and was positively identified as the murder weapon. The differences in the police report and the testimony at trial concerning the actual location of the second gun (underneath versus right beside) is not a new development, *Walker v. Bishop, supra* at 1381. The addition of the Kumpe-Eisner statement to this record creates no reasonable doubt as to petitioner's guilt.

6. I have been directed to detrmine whether the new evidence, when considered against the background of the existing record, sufficiently tips the balance of the "ends of justice" standard to require that a new trial be held. My answer to this question is strongly in the negative. I believe

that the evidence in the hearing before me taken as a whole confirms Walker's guilt in accordance with the two decisions of the Supreme Court of Arkansas on appeal from jury verdicts of guilt. The evidence also confirms the decision of Judge Henley in the first habeas hearing and the unanimous decision of the Court of Appeals.

7. Since much of this opinion has dealt with the issue of newly discovered evidence, the Court feels obligated to make an additional observation:

> The claim of newly discovered evidence relevant to the guilt of a state prisoner is generally not a ground for relief on federal habeas corpus. *Mastrian v. McManus*, 554 F.2d 813, 822 (8th Cir. 1977), *cert. denied*, 433 U.S. 913, 97 S.Ct. 2985, 53 L.Ed.2d 1099 (1977). To be a basis for relief, "such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief on federal habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 759, 9 L.Ed.2d 770 (1962).

Drake v. Wyrick, 640 F.2d 912, 913 (8th Cir. 1981).

As in *Drake v. Wyrick*, *supra* at 914, "[t]he newly-discovered evidence at issue here consists of an uncorroborated assertion by a fellow inmate of the petitioner that one of the state's witnesses told him a version of the crime different from the one the state's witness offered at trial." This court cannot conclude that this newly-discovered evidence would "probably produce an acquittal on retrial," *Mastrian v. McManus*, 554 F.2d 813, 823 (8th Cir. 1977), and therefore a writ of habeas corpus cannot issue on this ground.

Furthermore, Walker's attempts to gain a new trial from the state courts on the basis of newly-discovered evidence would also be unsuccessful. Newly-discovered evidence cannot form the basis of post-conviction relief, and

a direct appeal on this basis would be untimely. *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981).

The Clerk is directed to forward this Memorandum Opinion to the U.S. Circuit Court of Appeals for the Eighth Circuit, sitting en banc, together with the transcript, exhibits, and additional record developed before this court pursuant to recall of mandate and remand.